

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

STEVEN FODER, : Civil No.
 : 14-cv-3935 -MCA
Plaintiff, :
 : TRANSCRIPT OF
v. : TRIAL PROCEEDINGS
 :
PORT AUTHORITY TRANS HUDSON : VOLUME 3
CORPORATION, :
 :
Defendant.

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Newark, New Jersey
November 16, 2016

BEFORE:

THE HON. MADELINE COX ARLEO, U.S.D.J.

Reported by:
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

Pursuant to Section 753, Title 28, United States
Code, the following transcript is certified to be
an accurate record as taken stenographically in
the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

CHARLES P. McGUIRE, C.C.R.

APPEARANCES:

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1 (Jury out)

2 THE COURT CLERK: All rise.

3 THE COURT: Okay. Good morning, everyone.

4 Good morning, Chuck.

5 So tell me. We have an issue. Houston, there's a
6 problem?

7 (Laughter)

8 MR. ROSENTHAL: Yes, Houston, or, yes, wherever,
9 Cape Canaveral, there is a problem.

10 (Laughter)

11 THE COURT: Okay.

12 MR. ROSENTHAL: Our expert -- who is not
13 testifying right now; we're still on Mr. Foder's
14 testimony -- has a demonstrative exhibit that he built to
15 show the exact dimensions that were required for the --

16 THE COURT: Wow. That's quite an exhibit.

17 MR. ROSENTHAL: And it's solely to show the
18 dimensions, and that these are the dimensions.

19 And I think defense counsel is objecting to him
20 using that at trial.

21 THE COURT: It's not being admitted for evidence.
22 He's an expert. He's using a demonstrative. What's your
23 objection?

24 MR. MINO: The objection is that, one, we never
25 even got notice about this until about 10 minutes ago.

1 Two, it doesn't -- I think it's prejudicial to
2 PATH. It does not give an accurate representation of what
3 the entire train looked like. We have photographs that are
4 in evidence that show the exact train makeup, they show the
5 climb system, and there's really no reason for this.

6 If they think that the jurors really need to get a
7 sense of it, we'll gladly take them over to Harrison so they
8 can see the actual train. But this, just a couple portions
9 of the train, is not accurate. It's -- quite frankly, you
10 can't even ask for a demonstration on how to climb it
11 because I think the pipes would break.

12 THE COURT: I don't understand. We've talked.
13 It's not that complicated of a fact scenario. We've been
14 using the picture on the big screen and we've been using
15 this blowup to demonstrate with every witness the process or
16 the way in which Mr. Foder claims he was injured, and it's
17 simply how to get on and off the train, right? That's what
18 we were talking about.

19 And actually, when he was testifying, he talked
20 about -- you talked about the steps, the handlebar, and the
21 height, and the whole anti-climber, and there was a lot of
22 testimony about whether the anti-climber was the whole
23 diamond area or was just the two-inch edge and how the
24 anti-climber already goes from the edge all the way down to
25 the bottom of the area.

1 So I look at this exhibit, and it's a bunch of
2 pipes. And I'm concerned, frankly. Although my inclination
3 is always to let experts use demonstratives, it's not even
4 drawn to scale in terms of what the whole -- the whole case
5 is about this anti-climber. We've called it the
6 anti-climber. There is another phrase for --

7 MR. MINO: The vestibule.

8 THE COURT: The vestibule. There's the picture up
9 on the screen. And now I have something that doesn't even
10 show that part.

11 So I'm confused what probative value -- I mean,
12 it's really probative versus prejudice, and I'm concerned
13 that, given the way it's designed, it's not a prototype of
14 what we've seen in the pictures, it's something very
15 different.

16 MR. ROSENTHAL: Well, can I respond?

17 THE COURT: Sure.

18 MR. ROSENTHAL: Your Honor, there is a -- what we
19 have here in front, I don't know if you can see it, is the
20 step, the -- what we have here is the step up, and then this
21 is the anti-climber. This is the handhold. This is the
22 handhold, and this is how people are -- I mean, these are
23 the actual dimensions.

24 THE COURT: Here's the problem. You didn't give
25 any notice of this. I told counsel at the beginning of the

1 trial, any demonstrative, I said a week ago, share it with
2 each other.

3 And now I'm going to ask the Defendant -- he
4 doesn't know if this is the actual amount.

5 MR. MINO: I do not.

6 THE COURT: We can't measure it. If you had given
7 him notice, he could have looked at your scale.

8 You have this resting on top of the witness stand.
9 I don't know if this is up or down two or three inches. And
10 it certainly doesn't demonstrate the anti-climber, it just
11 demonstrates height. And I'm not sure today, there's been
12 no testimony about what the actual true height is in that
13 picture, and now you're putting two tubes and wooden pieces
14 on top of -- it just so happens that the top of the witness
15 box is the same exact height as the anti-climber?

16 MR. ROSENTHAL: No, actually, the anti-climber is
17 higher than this. This is --

18 THE COURT: Well, maybe it is, maybe it isn't.
19 But do you have dimensions?

20 MR. ROSENTHAL: We do.

21 MR. DiGIULIO: It's on his report, Your Honor.

22 MR. ROSENTHAL: All the dimensions are on his
23 report. He's going to testify about all this.

24 THE COURT: Well, the dimensions are one thing.
25 Anyone can testify about dimensions, and certainly Mr. Foder

1 was able to really actually demonstrate how he tried to get
2 up in front of that picture.

3 But this is misleading. The height is exactly the
4 same? The Defendant is now put in a awkward position and an
5 unfair position to try to even cross-examine when he doesn't
6 even know, you know, whether this is the same height as what
7 happened.

8 And even if it was the same height, it doesn't
9 demonstrative the anti-climber. It doesn't show the whole
10 area where he slipped.

11 It's a bunch of pipes. It's not even a prototype.
12 I don't know what it is. It looks like an amateur
13 reconstruction of something with like Sharpie ink on it and
14 tubes. It looks like a plumbing job. It looks like a
15 science fair project. It doesn't even closely resemble.
16 And if what you're trying to show is height --

17 MR. ROSENTHAL: Dimensions, right.

18 THE COURT: -- dimensions, you could do that in a
19 much less prejudicial way, which would be mark the tape --
20 have a piece of paper and just mark where the tape is. But
21 this gives a very unfair -- this prototype bears no
22 resemblance to reality, and if what you're trying to
23 demonstrate is purely height, there are a lot of fair ways
24 to demonstrate height. You can just show this; you can mark
25 it here, you can mark it here. You can have him mark it.

1 But to have this prototype, I'm not inclined to
2 let you have it. I think it's very prejudicial at this late
3 hour.

4 MR. ROSENTHAL: Okay. I understand. The
5 distances are difficult to just have us demonstrate fairly
6 to the jury are distances such as the distance from the foot
7 -- whatever that is, step, to the grab bar and --

8 THE COURT: But you just went to touch the grab
9 bar, you used your hand to pull it, and it's wobbly; it's
10 going to fall off. It's going to give a false impression to
11 the jury that the grab bar is of that strength. I could
12 knock this over with my hand. It's wobbly.

13 It creates an impression that is not consistent
14 with what's in his expert report, what the pictures show,
15 and reality, and it creates a false impression before the
16 jury.

17 And to spring this on the Defendant to show height
18 and the relation of the grab bar in this prototype that
19 bears absolutely no relation to reality, there's no pipes,
20 there's no Sharpie ink, it's not this flimsy and fragile,
21 runs the risk of creating a false impression with the jury
22 as to exactly what happened.

23 There's plenty of pictures. You could have brought
24 in an anti-climber. But I'm not going to allow this. I
25 think the prejudice far outweighs its probative value.

1 And your witness can testify without reference to
2 this thing. He could take a ruler, he could show height, he
3 could show -- but to say it shows proportion; I don't know
4 where the proportion is. The grab bar is affixed to the
5 car. This isn't affixed to anything. This is a pipe nailed
6 into a piece of two-by-four.

7 It's just not reality, so I'm not going to allow
8 it.

9 MR. MINO: Thank you.

10 THE COURT: Okay. We have to finish with
11 Mr. Foder.

12 MR. ROSENTHAL: I know, but can the expert come
13 and take this out?

14 THE COURT: Sure.

15 Let's get the jury.

16 THE COURT CLERK: All rise.

17 (The jury enters)

18 THE COURT: Welcome back, everyone. Good morning.

19 Okay. Let's see if everyone's happy. You look
20 still happy. The rain is gone. It's a good day to be
21 alive.

22 So, we're here in Federal Court. Thanks for
23 coming back, and we're going to continue with the testimony
24 of Mr. Foder.

25 Mr. Foder, you remain under oath. If you want to

1 take the stand.

2 S T E V E N F O D E R, called as a witness on his own
3 behalf, and having been previously sworn, testified as
4 follows:

5 MR. ROSENTHAL: May I begin, Your Honor?

6 THE COURT: Yes.

7 MR. ROSENTHAL: Thank you.

8 DIRECT EXAMINATION (CONTINUED)

9 BY MR. ROSENTHAL:

10 Q. Steve, I think we left off after your second surgery.

11 A. Correct.

12 Q. Tell the jury about your recovery from the second
13 surgery.

14 A. My recovery after the second surgery was similar to
15 the first in a way, just the pain was a little different. I
16 had more pain in the second one. But it was a similar
17 process. I was, you know, bedridden, home-ridden, off my
18 foot for eight weeks.

19 THE COURT: Could we just stop for one second?

20 Counsel, could I just see everyone at sidebar for
21 one second?

22 I'm sorry, Mr. Foder.

23 One second, just one quick follow-up issue.

24 (The following takes place at sidebar)

25 THE COURT: I'm sorry to interrupt your direct.

1 To preserve the record, I think we need to mark
2 that as a Court Exhibit, because if there is ever an
3 appellate issue about not allowing that in, we don't have
4 it. We don't have a picture of it.

5 MR. ROSENTHAL: Okay. Of the demonstrative.

6 THE COURT: I just didn't want the expert to throw
7 it out or something.

8 MR. ROSENTHAL: We'll mark that as Court Exhibit
9 3.

10 THE COURT: Mark it Court Exhibit 3 at the end of
11 the day, and we'll put it in the jury room. I just don't
12 want it thrown in the garbage.

13 Thank you.

14 (The following takes place in open court)

15 THE COURT: Again, I apologize.

16 THE WITNESS: No problem.

17 BY MR. ROSENTHAL:

18 Q. I think you were saying about, the pain was different?

19 A. Yeah. My pain level was a little bit more on the
20 second surgery because it was a more massive surgery. But
21 the process was similar to the first one. I was bedridden
22 or, you know, home-ridden to crutches I guess eight, 10
23 weeks, began therapy as soon as the cast came off. Then I
24 got put into the boot again, the special boot, and then
25 another two months, three months go by, and then transition

1 into a sneaker again.

2 Q. Now, you had mentioned bedridden before with the first
3 surgery swell. Are you referring to --

4 A. Well, just really not mobile. I couldn't be that
5 mobile. You know, I was off my feet without the use of
6 crutches, I mean, and it's tough, you know. You only use
7 the crutches like if I really had to go somewhere, you know,
8 like the bathroom or if there was an emergency to go
9 somewhere or I had an appointment. But other than that, I
10 was, you know, on the couch or watching TV or something of
11 that nature while I was injured, yeah.

12 Q. And as you were transitioning into the boot and then
13 into your sneaker, how was the pain level through all that?

14 A. It was tough. Again, it's nothing quite like right
15 after surgery, you know, the pain does subside. I was still
16 in pain, so -- it was -- it was tough.

17 Therapy was the hardest part for me most of the
18 time, because, you know, moving -- moving something that's
19 been immobilized for so long brought a lot of pain, so I
20 remember having to take my painkillers those days. Those
21 were really bad days.

22 Q. And how was your back through -- at this point?

23 A. My back is still bad. I see a chiropractor weekly.
24 The last time I saw him, I had a scan, like a body scan, and
25 he told me that my hips were off alignment because of the

1 injury and, you know, the way that I also compensate for the
2 way I walk now from the pain, so part of my body has
3 shifted, so like my hip's kind of out of place in a sense,
4 you know?

5 Q. But you didn't miss any time from work for your back
6 specifically?

7 A. No. No.

8 Q. And other than your back and your ankle, do you have
9 any other pain or pains? And I'm talking now about by the
10 time that you were recovering from the second surgery, is
11 there anything else that's in pain other than your ankle and
12 your back?

13 A. No. I mean, unless you want to cover my new medical
14 discoveries, but besides that, no.

15 Q. No, relating to this case.

16 A. No.

17 Q. Now, I want to digress for a moment and have you talk
18 about, outside of the pain that you're feeling specifically
19 in your ankle, by the time of the second surgery, you
20 recovered from the second surgery, had there been any
21 changes in your life that were caused by your ankle
22 problems?

23 A. All right. I'm sorry. Can you repeat that one more
24 time?

25 Q. After your second surgery, --

1 A. Right.

2 Q. -- other than the pain that you're feeling and the
3 surgeries that you had, the medical stuff, has there been
4 any other changes in your life that you attribute to the
5 injury that you had at PATH on July 22nd, 2011?

6 A. Yeah. My whole life has changed.

7 Should I just -- can I tell like everything, like
8 the whole?

9 Q. Well, how was your -- tell the jury how your life was
10 changed.

11 A. Before my accident, I had a house. I lived with my
12 fiancée and my daughter. After my first accident, my first
13 -- my first accident -- after my first surgery, I was out of
14 work for six months, and I didn't have the funds in my bank
15 account to -- to keep my house, so I wound up selling some
16 of my stuff just to pay rent, and, you know, mortgage, rent,
17 put food on the table. And push came to shove, I lost it,
18 and I had to ask for help.

19 So I called my family, and, you know, originally,
20 before that, of course, I came from my mother's house like
21 everybody else. And I called for help, but they didn't
22 really have the room for me and my new family, so they made
23 -- you know, they said that they'll clean out their garage,
24 which was like -- it was an attached garage with a door to
25 go into the house. So we stayed there in a semifinished

1 garage, me, my fiancée, my daughter, and we stayed there for
2 a while.

3 Winter came, and it was getting -- it's really
4 cold in there because the door is like paper-thin, it's a
5 garage door, so -- it was cold. My daughter was a newborn,
6 barely a year old. So I bought a heater, and it helped. I
7 bought an electric heater, but the problem is it just took
8 like two to three hours to heat up the garage, so it was
9 just unsuitable for my daughter.

10 So she wound up contacting her family, and she --
11 they didn't have the room for me, so they went back there.
12 But it was like --

13 Q. Your fiancée, you're talking about?

14 A. My fiancée and my daughter, yeah. It was about an
15 hour, hour ride. And that's -- with my injury, it was hard
16 to, you know, see them all the time. And we ran into some,
17 you know, financial issues, you know, between us, and it
18 created some distance, you know, even further than the
19 actual distance that was between us.

20 She wound up moving, you know, moving on
21 eventually or seeing somebody else, and, you know, it was --
22 it was tough, because I didn't really have a -- like the
23 whole father thing growing up, so that's something I really
24 wanted to do for my daughter, and it affected me in a lot of
25 ways. And, you know, imagine, like I wasn't even able to

1 carry my daughter from the kitchen with a bottle back to the
2 garage because at any given time, even in a boot, or in my
3 sneaker, my leg could give out and I'd drop my daughter. So
4 I missed a lot of -- a lot of her newborn -- newborn life, I
5 guess, in a sense.

6 And even after that now, it's -- it's tough
7 because like I can't run after her and -- you know, I had a
8 father, you know, like everybody else, and he had drinking
9 problems, and we never did anything together ever. So I
10 always wanted to do stuff for my daughter. You know, now,
11 like, that she's older -- remember, this isn't just a thing,
12 this has been years for me, so I'm talking throughout the
13 whole process, going like when she's running in the park
14 with her friends or her cousins, and she's trying to tag me
15 to play, and I can't chase her, I just hope that one day she
16 does understand that there are reasons why that I couldn't
17 do it because of my -- I can't. You know, I still think
18 about it for me in my sense when I was a kid, where was my
19 father? So I just don't want her to have the same feelings
20 that I have towards my father towards me. So, yeah, that --
21 that's something that's big for me.

22 I can't do a lot of other stuff I do, you know. I
23 gained like 50 pounds. I went from like 215 to 286 after my
24 surgery. My friends, my boys, ridicule me all the time.

25 You know, guys at my job called me the weatherman

1 because a couple days before it rains, my limp gets bad, and
2 they're like, oh, it's going to rain, ha-ha-ha, just tease
3 me and stuff. But -- I mean, it's been really difficult,
4 really hard.

5 Q. Let's bring it back to, we were -- first of all,
6 yesterday, there was a lot of questions about union members.
7 Are you in a union?

8 A. Yes, I'm in a union.

9 Q. And what union are you in?

10 A. I'm in the BLE.

11 Q. Okay. That's part of the Teamsters?

12 A. Yes, Brotherhood of Locomotive Engineers.

13 Q. And you've been a union member since you started on
14 the railroad?

15 A. Yes.

16 Q. Now, your recovery from the second surgery, as you
17 were recovering, take us to your recovery into the period of
18 time that you decided that you could go back to work from
19 that second surgery.

20 A. From the second surgery to when I went back?

21 Q. When you went back, the second surgery was in October
22 --

23 A. Right.

24 Q. -- of 2013; is that correct?

25 A. I believe so.

1 Q. Halloween?

2 A. I believe so, yeah.

3 Q. And I believe -- did you go back to work in April of
4 2014?

5 A. Yes.

6 Q. How was it that you went back to work at that time?

7 A. I went back to work -- some of my pain, again, has
8 subsided. I'm still in pain. Again, the doctor told me a
9 long road to recovery, approximately another year --

10 Q. This is Dr. Greisberg?

11 A. Yes -- you know, before you really like notice, you
12 know, a difference. So I stuck it out, went through the
13 whole thing, and that was that.

14 Q. And did he -- who suggested that you go back to work
15 by April 2014?

16 A. I did, and my doctors, I guess, cleared me, yeah. I
17 felt that, you know, my pain wasn't going to get magically
18 better, and I couldn't stay home anymore, and I needed to
19 try to go on with my life, so I, you know, said, hey, am I
20 cleared? Yeah, you should be cleared, continue with therapy
21 while you're at work, you've got to do home exercises and
22 all these other things, so --

23 Q. Did you do that, the home exercises?

24 A. Yes. I still do them today. I have to, probably
25 forever.

1 Q. By the time you're going back to work in April of
2 2014, where are you living? With your parents?

3 A. Yeah.

4 Q. Has your girlfriend and daughter left by then?

5 A. Yes. Yes. This is after the second surgery. Yes,
6 they're gone.

7 Q. Okay. How often are you seeing your daughter at that
8 point?

9 A. I was trying to see her as much as I could, but still
10 -- I was still, you know -- I had no financial, I had no
11 finances, they were far away, so it was tough to see her as
12 much as I could at that given time 'cause I wasn't getting
13 paid, so I didn't have anything. I barely had insurance on
14 my car. I remember I lost it, and then I got it back
15 eventually, so I couldn't drive for a while. I had to get
16 her whenever she would bring her around at that given point,
17 yeah.

18 Q. So by the time you -- tell us about how it was when
19 you went back to work in April of 2014.

20 A. I went back to work, still in pain, still doing my
21 therapy, just trying to get everything that I lost, which --
22 try to build it back up, you know, back to what I had. I
23 had a lot that I lost, but just something. Insurance on the
24 car was the best start, you know, money in my pocket, that
25 was great to start with.

1 Q. But in terms of the work itself and the pain.

2 A. I was in a lot of pain, but like I said, I was focused
3 on getting better and being more active with my daughter. I
4 wanted my daughter.

5 Q. And what happened next?

6 A. So I'm working. I can't tell you for how long. I
7 think it's probably over a year, again. And my pain level
8 was always, you know, at a certain set point. And then one
9 day, I started feeling -- I woke up and I just started
10 feeling like excruciating pain again, but this time it
11 wasn't from the same spot in my ankle. It was still in my
12 ankle, just a different location. And I was like, what's
13 going on?

14 So, you know, I went to work and then went to the
15 doctor.

16 Q. Dr. Greisberg?

17 A. Yes.

18 Q. Now, I have you being out from November 25th, 2014,
19 which is, I guess, about seven months after you came back to
20 work. Does that sound about right?

21 A. Yeah, I guess. A year, seven months, I guess.

22 Q. No, just seven months, not a year and seven months.

23 A. No. Yeah, seven months to a year. I wasn't exactly
24 sure of the exact number, but --

25 Q. Oh, okay. So what happens when you go back to

1 Dr. Greisberg?

2 A. They ordered me for an MRI.

3 Q. Okay, but they can't do an MRI at that point; right?

4 A. No. No.

5 Q. What do they do? If you remember.

6 A. I'd like to say it was a CAT scan, but I could be
7 wrong. I don't remember exactly.

8 Q. Okay. And so whatever testing was done, what does
9 Dr. Greisberg say? Or what is your understanding as to what
10 it is that Dr. Greisberg is recommending to you at that
11 point?

12 A. Well, what he told me was that all the hardware that
13 was in my bone -- my bone started growing out, and it pushed
14 the hardware out of the bones, and it was starting to slice
15 my ligaments, and I almost lost one of my ligaments in my
16 ankle at that point.

17 Q. What did he recommend?

18 A. Surgery again.

19 Q. Did you do that?

20 A. Yeah. At that point, I had to. He said that if I
21 didn't do this now, I was going to be in big trouble. So...

22 Q. And what is your understanding as to what happened
23 during the surgery, what the surgery was?

24 A. They went back into my ankle and removed pins and
25 screws and a rod or whatever was in there, yeah.

1 Q. Now, that was your third surgery?

2 A. Yeah.

3 Q. Take us through your -- how were you after the
4 surgery?

5 A. Immediately after?

6 Q. Immediately after.

7 A. Immediately after, I was in pain again, just like
8 anything after major surgery, I was in horrible pain.

9 Q. Are you taking medication through these periods of
10 time when you're out?

11 A. Yeah. I was taking Vicodin again at that time.

12 Q. Are you taking Vicodin after each of your surgeries?

13 A. Yeah, because the OxyContin, I had allergic reactions
14 to it and gave me like -- I was scratching everywhere.

15 Q. Okay. So take us through your recovery from the third
16 surgery.

17 A. So I had the hardware removed, and I had to do therapy
18 once again, the same way as before. Therapy, boot, sneaker,
19 same project all over again.

20 Q. And how was it that you went back to work after the
21 third surgery?

22 A. I went back. The pain was nowhere near what it was
23 when it was slicing my ligaments, but it was still bad, you
24 know, and my doctor just told me, you know, it's a long road
25 to recovery and keep it -- keep it up, and he says, you

1 know, it will never be the same, so just expect it, and feel
2 it.

3 Q. Now, I have you going back to work in April of 2015.
4 Does that sound about right?

5 A. Sounds about right, sure.

6 Q. And just for the record, I just want to make sure that
7 I have the dates correct.

8 From the date of the accident, you did not work,
9 until February 17th, 2012?

10 A. I believe so.

11 Q. And that was your recovery from the first surgery?

12 A. Yeah, I believe so.

13 Q. And from the second surgery, you were out from October
14 28th, 2013 to April 7th, 2014? Does that sound right?

15 A. Sounds about right, yeah.

16 Q. And for the third surgery, you were out from November
17 25th, 2014 to April 17th, 2015?

18 A. Yeah, it sounds about right, too. I don't know the
19 exact dates. I don't want to lie.

20 Q. But does that sound about right to you?

21 A. Yeah, it sounds about right.

22 Q. Now, during your period of time when you were able to
23 work, were you able to work overtime?

24 A. Yes.

25 Q. And about how much overtime would you work? Per week?

1 A. It all depends, because we were on a roster for
2 overtime, so some weeks I'd get more, some weeks I'd get
3 less. So it all depends. I'd say one to two days a month
4 at that time.

5 Q. Okay. So one to two days a month. Let's assume one
6 day a month. That would be about two hours a week?

7 A. Yeah.

8 Q. Okay.

9 A. Two hours a week.

10 Q. And when you were working overtime, are you getting
11 paid time and a half?

12 A. Yes.

13 Q. Do you know what your rate, overtime rate was at the
14 time?

15 A. Exactly down to the cent amount, no. Somewhere around
16 \$55 an hour overtime.

17 Q. Okay. And you worked out what your -- for the 17
18 months, you were not able to work overtime; is that correct?

19 A. Correct.

20 Q. And you worked out what you lost in overtime pay for
21 those 17 months the net figure after taxes; correct?

22 A. Yes.

23 Q. And the number you came to was \$5,627, approximately?

24 A. Approximately, yeah.

25 Q. Now, when you went back to work after the third

1 surgery, tell us about how that was.

2 A. Well, that was it for me at that point with surgery,
3 but I went to work.

4 Q. Were you fully recovered?

5 A. No. No. My doctor said, like I mentioned earlier,
6 that it was going to be a long process, it could take a
7 while, a year, maybe more, depending on how my body heals.
8 But I had pain, and I'll always have pain, probably, you
9 know.

10 Q. And now I want you to talk -- I want to ask you
11 questions about and I want you to answer about now, okay,
12 how you're feeling now.

13 After you went back to work in April 2015 until
14 today, has there been any change in your pain level in your
15 ankle?

16 A. No. No. Not -- not really.

17 Q. Tell the jury how you're feeling now.

18 A. I'm still in pain. I still walk with a limp. I still
19 have to kind of -- how do I say -- like compensate the way I
20 walk for my right leg.

21 I still -- you know, it's -- it's so hard to
22 describe, it's --

23 Q. Try your best. This is -- this is it.

24 A. It's just -- my ankle locks occasionally, you know,
25 and then it will like crack out. Just walking, like --

1 like, I can't do a full day of walking like you. You know,
2 you go to Six Flags or a museum or a water park, like, I
3 can't do that, because by the end of the day, my ankle will
4 be twice the size that my left one is and I won't be able to
5 get my shoe off, or, you know, it's just, depending on how
6 high it is, my ankle just blows up in a lot of pain, and
7 it's rough. It hurts the whole time, especially two days
8 before it rains is the worst.

9 Q. But you're able to work?

10 A. Yeah, I -- I have to go to work, yes. I want to.

11 Q. Now, we saw -- the job that you have, the jobs that
12 you've had since you came back to work, have they been
13 switching jobs or running jobs?

14 A. No, I -- I have the option to pick either/or. I try
15 to stay away from the yard jobs because it's just too much
16 walking and up and down, up and down. The passenger service
17 job for me is a lot easier. I only have to do it once, and
18 then I'm on the train and it's all flat ground, I don't have
19 to worry about, you know, constantly all day long being
20 through it, so...

21 Q. Are you able to get up the PA-5 trains at track level?

22 A. Yeah, I have no problem.

23 Q. Now, is there any part of your job that you can't do
24 now?

25 A. No, I can do it all. I just tend to prefer to stay

1 away from the other one, but I can do it all.

2 Q. Now, I want to ask you about outside of work. What
3 are the things that you can't do that you were able to do
4 or that you were doing before you got hurt in July 22nd,
5 2011?

6 A. Well, even right before my incident, I was in a
7 football league. I played football. I went on a lot of
8 trips. I did a lot of them like city challenges, like
9 benefits, you know, like obstacle courses.

10 Q. Explain what that is to the jury.

11 A. Like, they do the charity runs, like the charity
12 obstacle course, this time it's for breast cancer, this time
13 it could be for anything else, so --

14 Q. Is it a race, a running race?

15 A. Yeah. I never really treated it as a race. I just
16 did it for fun, like, did the obstacles courses and all that
17 stuff.

18 I can't do that.

19 Us, me and my fellow employees at work, the cops
20 and everybody, we all went paintballing all the time, bus
21 trips. And I was good. I used to play my whole life,
22 almost. So, believe it or not, the Port Authority cops made
23 me their team captain. So I was always playing.

24 I can't do that anymore.

25 I boxed since I was like 11 years old on and off.

1 Around the time I had my daughter, I stopped for a little
2 while, but I did that.

3 That, I can no longer do. That was something that
4 I really always loved.

5 Just anything that involves -- like anything on my
6 ankle that's physically challenging is just tough to do.
7 Like I said before, even Six Flags is tough because a long
8 day of walking is -- is -- it's tough for my leg.

9 Q. As we sit here right now, do you have pain in your
10 ankle?

11 A. Yeah. I'm always going to have pain.

12 Q. Now, are you able to run?

13 A. No, not run. I mean, if I'm -- if I had to, I could
14 probably do a light jog, if I had to, for a very short
15 distance. But like I said, I'll -- I'll be in pain worse,
16 so I don't do it unless it's like absolutely necessary.
17 Like if my daughter's bolting towards the street and I have
18 to run to get her, I'll grab her, you know? But that --
19 besides that, no, you know.

20 Q. Did you have any other hobbies that were affected by
21 your ankle?

22 A. So -- it's so hard being up here and trying to tell
23 you and thinking on the fly everything that I've done.

24 Q. Try the best you can.

25 A. Football, boxing...

1 Q. Did you ride your bike?

2 A. That's -- yeah, but I can't do that anymore either,
3 really. That's something I did, like you heard earlier, I
4 had an accident in 2009. I enjoyed riding here and there.
5 But I can't really do that anymore either because I can't
6 support the weight of the bike on my leg, you know. So when
7 you come to the red -- red light, I can't really put my feet
8 down and support that. Even if I lean to my left, you know,
9 if I had to lean into my right for some reason on my right
10 leg, I'd be in -- I don't know what could happen. If my
11 ankle gave out, I -- the bike would come crashing down. So
12 no, I don't ride anymore, really, either.

13 Q. And when you're talking about a bike, you're talking
14 about a motorcycle?

15 A. Yeah, motorcycle, yeah.

16 Q. Now, have you had occasion to be on the motorcycle in
17 the last five years?

18 A. Once, maybe, maybe once, and that was it. I never
19 rode it again, and that was it. It's sitting.

20 Q. And are there -- other than what you've testified
21 about, is there anything else with regard to your daughter
22 that you can no longer do?

23 A. That little girl's my world, so I'll do anything I
24 can. But it does -- it just sucks not being able to really
25 play with her in -- in the fashion that she wants to play

1 in, or when she was a kid, it was bad, you know, I couldn't
2 carry her around. It's just tough. But a lot -- that's --
3 that's main -- you know, a lot of it with her. It's just
4 not being able to fully be there and participate in her life
5 like the other fathers do that are around, like my friends
6 who have kids and who we go to the park and they'll go
7 chasing them on the jungle gym or jump down the slide with
8 them or something. I just can't do it, and it's just tough.
9 It's just tough.

10 MR. ROSENTHAL: Nothing further, Your Honor.

11 THE COURT: Thank you.

12 Okay. Cross-examine.

13 MR. MINO: Your Honor, can I be heard at sidebar
14 briefly?

15 THE COURT: Sure.

16 (The following takes place at sidebar)

17 THE COURT: Okay.

18 MR. MINO: Judge, during testimony, Plaintiff put
19 his financial status directly at issue. He said he lost his
20 house because he was not getting a paycheck.

21 At this point, he's allowed to be impeached with
22 the Railroad Retirement Board benefits that he received.

23 Cases that say this --

24 THE COURT: I agree.

25 MR. ROSENTHAL: If you want to impeach him, I have

1 no objection.

2 THE COURT: Yes.

3 MR. MINO: Just a clarification. If I impeach him
4 with the stuff PATH paid, that opens up the door to the
5 whole lien thing, right? Or no?

6 THE COURT: Let's think it through.

7 If you just impeach him on the amount -- what are
8 you going to impeach him on; what he got paid?

9 MR. MINO: With respect to the Railroad Retirement
10 Board's benefits, yes, that he got paid and he received the
11 amount.

12 THE COURT: He didn't get the whole amount.

13 MR. MINO: The Railroad Retirement Board is
14 separate from PATH.

15 THE COURT: Okay.

16 MR. MINO: The Railroad Retirement Board is a --
17 they pay into a full pension -- it's a third party, but they
18 also get sickness disability when they are out sick or when
19 they're out hurt, and he received benefits from them. For
20 the time that he got half and no pay from PATH, he was
21 receiving some money from them.

22 THE COURT: Did he get full money?

23 MR. MINO: Not a full paycheck, no.

24 THE COURT: Okay. But i thought we agreed -- what
25 is the stipulation, that that whole amount would be put back

1 in?

2 MR. ROSENTHAL: We're not talking about that.
3 We're talking -- in addition -- what PATH paid aside, for
4 the period of time that PATH wasn't paying him, he was
5 entitled to certain benefits from the Railroad Retirement
6 Board --

7 THE COURT: Money.

8 MR. ROSENTHAL: Money -- of whatever it is,
9 like --

10 THE COURT: They have a lien on that money.

11 MR. ROSENTHAL: No, no, the Railroad Board does.

12 THE COURT: That's what I mean.

13 MR. DiGIULIO: That's separate and apart.

14 MR. ROSENTHAL: Right. So what counsel is saying
15 is that when Mr. Foder said that he couldn't afford
16 something, he opened the door for them asking him, well,
17 isn't it true that you got railroad retirement sick
18 benefits.

19 THE COURT: Right.

20 MR. ROSENTHAL: And he opened the door. So --

21 THE COURT: But do you want to bring out the lien?
22 Because I don't know if the lien is relevant. The
23 lien is only relevant if he gets an award, right?

24 MR. ROSENTHAL: Right. We're not talking about
25 the -- the lien that we're talking about. We're just

1 talking about the Railroad Retirement benefits.

2 THE COURT: Did the Railroad Retirement Board have
3 a lien on this?

4 MR. MINO: Yes.

5 MR. ROSENTHAL: Yes.

6 THE COURT: But that's not relevant because
7 they're only going to assert that lien if he gets a
8 judgment.

9 MR. MINO: Yes.

10 MR. DiGIULIO: Right.

11 MR. ROSENTHAL: Yes.

12 THE COURT: So in other words, it's not like he
13 had to -- if he had to pay it back no matter what, you would
14 argue the lien, but he only has to pay it back if you get a
15 judgment, so it's not relevant. What's relevant is that he
16 said, I lost my house, I didn't have enough money, and gave
17 the impression to the jury that he wasn't getting paid. You
18 can impeach him with the fact that he got extra money, just
19 as you could impeach him if his mother was giving him cash.

20 MR. DiGIULIO: I don't think anyone says --

21 MR. MINO: So I'm clear, if I try to impeach him
22 with the amount that PATH paid, right, because PATH did pay
23 him some wages, that then opens up the door to the lien
24 issue, or it does not?

25 THE COURT: I don't think it opens up the door to

1 the lien issue at all. I'm not inclined to allow you to
2 open up the door to the lien issue because I don't think the
3 lien issue is relevant. What's relevant is that he had
4 money coming in, and he can argue that he had enough money
5 to pay the mortgage. He can ask what the mortgage is and
6 say, you essentially got 80 percent of your salary, so if
7 you got -- the equivalent of 80 percent of your salary.

8 MR. DiGIULIO: If he starts talking about that he
9 was paid by PATH, the jury may consider that in rendering a
10 verdict.

11 THE COURT: But that's why we'll have an
12 instruction. That's why there's jury instructions, which
13 will say you can only consider pain and suffering and not
14 consider wages. That's what we talked about. Because
15 there's a lien.

16 So he can impeach him, and I'll give them
17 instructions on impeachment on this issue. They can
18 consider that for the narrow issue of any pain and suffering
19 he suffered because he lost his house. I mean, that was his
20 testimony: I had to sleep in the garage, I didn't have a
21 heater. That's a compensable harm. But what isn't
22 compensable is the loss of salary, and we're going to
23 instruct them specifically on that. That's the fair balance
24 that I would like to strike.

25 MR. ROSENTHAL: Well, if he's impeached with the

1 fact that he was getting certain wages from PATH -- the
2 Railroad Retirement Board is something else, but from the
3 PATH wages, then he should be able to testify that he --
4 just as with the Railroad Retirement Board that he has to
5 pay that back from any verdict that he gets.

6 THE COURT: But that's the whole point. It would
7 only be relevant, the lien, if he had to pay it back no
8 matter what. If the lien existed -- if they were going to
9 come after him for that money even if he got a no cause,
10 that would be very relevant that he really didn't get the
11 money, to put it aside to pay it back. But we know he's
12 getting paid all of the money and there's a lien. So you'd
13 only confuse the jury and allow them to give a double
14 recovery because he's going to -- we'll read about this
15 extensively. If there is a verdict, all the wages get put
16 in, and then the lien comes out again.

17 MR. ROSENTHAL: I understand.

18 THE COURT: I'm not opening the door to the lien.
19 It's going to be way too confusing for the jury. It's
20 impeachment on a narrow issue, and it's going to be dealt
21 with by an instruction not to consider lost -- not to
22 consider wages. It's not part of your consideration in this
23 case.

24 MR. ROSENTHAL: And also, I would ask for an
25 instruction that he's not getting Workers Compensation, so

1 there's no confusion about that.

2 THE COURT: We'll talk about that. That's a
3 separate issue. But I'm not going to decide that now. I'm
4 just making the decision today that he can cross-examine him
5 on the money he got, and you can't open up the issue of the
6 lien.

7 MR. DiGIULIO: One last issue.

8 When we checked -- we called the RRB -- when you
9 call the RRB --

10 THE COURT: R --

11 MR. DiGIULIO: RRB, the Railroad Retirement Board.

12 THE COURT: RRB?

13 MR. DiGIULIO: RRB.

14 THE COURT: Okay.

15 MR. DiGIULIO: They send you a fax printout of
16 what the lien is. So when we did this, it was just north of
17 \$5,000. Mr. Mino has information that it may be more. We
18 called again. They confirmed --

19 MR. MINO: Okay.

20 MR. DiGIULIO: No problem there?

21 MR. MINO: Yes, because we had it at 19, and they
22 called again, and they said it's back down to five.

23 MR. DiGIULIO: Okay. That's all.

24 THE COURT: So the only money he got this whole
25 time out was \$5,000?

1 MR. DiGIULIO: Correct.

2 MR. MINO: My understanding of it.

3 THE COURT: Okay. I mean, I thought it was a lot
4 of money; and it's not a lot of money.

5 MR. MINO: No, but --

6 MR. ROSENTHAL: No, but he's talking about the
7 wages as well. The wages are like 23,000.

8 THE COURT: Okay.

9 All right. Thank you.

10 (The following takes place in open court)

11 THE COURT: All right. Your witness.

12 CROSS-EXAMINATION

13 BY MR. MINO:

14 Q. Good morning, Mr. Foder. How are you?

15 A. Good morning. How are you?

16 Q. I'm doing all right.

17 Now, you were here yesterday when Mr. Avril
18 testified; right?

19 A. Correct.

20 Q. And you heard what he said?

21 A. Yes.

22 Q. But if I understand your testimony correctly, you
23 think he lied.

24 A. Lied, or just kind of covered himself, maybe, in a
25 sense.

1 Q. Okay. So you think his testimony was not true. And
2 I'm talking specifically about the training that you
3 received when you started as an engineer.

4 A. In what regard exactly?

5 Q. If you remember, Mr. Avril testified that you,
6 specifically, you, because he trained you, were trained to
7 put your entire foot on the diamond plate.

8 A. Yeah, that's not true, and he didn't train me.

9 Q. Okay. Oh, so he lied about all of that.

10 A. Well, there was two other operations examiners who
11 trained me.

12 Q. So it's your testimony that he lied not only about
13 where he told you to put your foot, but he just made the
14 whole thing up about training you in particular.

15 A. He didn't train me. He even said it yesterday.

16 Q. I believe his testimony was that he showed you right
17 in the beginning --

18 A. He said there was an orientation.

19 Q. Right. Did he make up the orientation that you were
20 in?

21 A. Everybody has an orientation. He seen me climb the
22 train. That was it.

23 Q. That's not my question. Were you in the orientation
24 where he specifically instructed you to put your entire foot
25 on the diamond plate?

1 A. There was never any such orientation that -- the way
2 you're saying occurred.

3 Q. So he made that up as well.

4 A. Yes.

5 Q. Was there any part of Mr. Avril's testimony that you
6 didn't think he was lying, or did you think he lied the
7 whole time?

8 A. No, he told the truth in some circumstances as far as
9 the examiners who trained me, and, you know, his operations
10 examiners are rule enforcers, which is all true.

11 Q. Now, you also, if I understand your testimony
12 correctly, you also think that he lied about the gloves?

13 A. Nobody wears gloves unless, like I said -- yesterday.

14 Q. So then it's your testimony that he made up the whole
15 portion of his testimony where people have been reinstructed
16 to wear the gloves.

17 A. I believe so.

18 Q. Okay. And then also the portion where he said that
19 some would even be disciplined for not wearing the gloves.

20 A. Never heard of it.

21 Q. Okay. Now, by the time we get to July 22nd, 2011,
22 give me an estimate of how many times you had climbed up
23 from track level onto a train.

24 A. An estimate?

25 Q. Yes. It's going to be a rough estimate, I know that,

1 but --

2 A. I was there a year. I was there a year, training six
3 months, classroom six months, in the yard, so -- in the
4 yard, I could have been up and down 10 times a day, so, I
5 don't know, do the math: A couple hundred, maybe?

6 Q. All right. Couple hundred times.

7 A. I'm assuming, though.

8 Q. No, I understand. We'll -- give or take a little bit
9 on each end.

10 A. Sure.

11 Q. That's fine.

12 Now, the training that you're talking about; how
13 long was the training from when you started as an engineer
14 until you were certified as an engineer?

15 A. From the very beginning, first day of class?

16 Q. Yes.

17 A. I'm going to say it was approximately a year.

18 Q. Approximately a year.

19 A. I would say so.

20 Q. Okay.

21 A. Between class, on the field, light train, passenger
22 service, approximately.

23 Q. And you mentioned class. So they don't just toss you
24 onto a train and tell you to drive it, right? There's a
25 portion where you're only in the classroom, learning stuff?

1 A. Yeah, in the beginning.

2 Q. Okay. How long does that take?

3 A. I believe that's approximately six months as well.

4 Q. So that's the first six months; right?

5 A. I could be wrong, it was a long time ago, but these
6 are approximate, yes.

7 Q. That's fine, and it's fine to approximate like that.

8 So for about the first six months, all you're
9 doing is learning stuff in the classroom; right?

10 A. Yeah.

11 Q. Then the last six months, what goes on there?

12 A. You're in the yard, training. You're putting all the
13 stuff you learned in the classroom to use, like your
14 breakdowns. That was probably one of the biggest things
15 that you learn there, because you're not really learning --
16 when you're in the yard, you're not really learning how to
17 drive trains at that point, you're really learning how to do
18 all your switching moves, which is uncoupling, coupling
19 trains, that, and the breakdown part of it. That's the main
20 focus of that part.

21 Q. Now, when you say the yard, what yard are you in?

22 A. You're in Harrison yard.

23 Q. In Harrison?

24 A. And other yards, but the majority.

25 Q. During that training period, are you ever in Journal

1 Square?

2 A. That's towards the end. It's -- the bulk of it is in
3 Harrison.

4 Q. Okay. But towards the end, you're in Journal Square?

5 A. I think it's for maybe two weeks, yeah.

6 Q. Okay. And Journal Square is where your accident
7 happened.

8 A. Yes.

9 Q. Now, at some point, either during the classroom
10 training or the training when you're in the field learning
11 how to drive the trains or fix the breakdowns, mainly, as
12 you're saying, are you given the PATH book of rules?

13 A. I was given the PATH book of rules on date of hire.

14 Q. Okay.

15 A. So it was before that.

16 Q. All right. So by the time you became an engineer, you
17 had the PATH book of rules.

18 A. Yes, sir.

19 Q. So then fair to say by July 22nd, 2011, you still had
20 the PATH book of rules; right?

21 A. Yes, sir. We were required to have it on us at all
22 times, or in your locker.

23 Q. Okay. So it's either physically on your person or in
24 your locker at all times?

25 A. In your carry bag or in your locker, yes.

1 Q. Okay. And not only do you have to carry it; you also
2 have to be familiar with it, right?

3 A. Sure.

4 Q. Okay. And one of those rules says that you have to
5 report all unsafe conditions as soon as you see them; right?

6 A. Correct.

7 Q. Okay. All right. And do you consider reporting an
8 unsafe condition telling your conductor?

9 A. Telling my conductor what?

10 Q. That there's something unsafe.

11 A. You got to be a little bit more specific in what
12 you're saying.

13 Q. Sure. So when you report an unsafe condition,
14 right, --

15 A. Sure.

16 Q. -- you report it to a supervisor, right? You don't
17 you report it to someone that's at the same level as you.

18 A. Yeah, if you're reporting something unsafe that they
19 don't know about, you know. There's a difference between
20 reporting something unsafe and complaining.

21 Q. What's the difference?

22 A. Well, there's a difference as far as there's something
23 there every day that everyone knows is unsafe that doesn't
24 change, that, you know, people already know about, your
25 immediate supervisors, and then just complaining about it

1 with your fellow employees. So there's a difference.

2 Q. Okay. So when you see something that you think is
3 unsafe, you go through the process in your mind of
4 determining whether or not you think a supervisor already
5 knows about it, and then based on that, you report it or
6 not.

7 A. Absolutely not. I always -- I always talk to my
8 supervisors if I find an immediate problem. But if my
9 supervisor walks on the same thing or sees the same problem
10 as me, if we both just stepped in grease, I'm not going to
11 say, hey, buddy; I know, like, he just did it. That's what
12 I'm saying.

13 Q. Okay. So let's go to July 22nd, 2011.

14 A. Okay.

15 Q. I believe your testimony was that you walked down onto
16 track level from the dispatcher's booth; right?

17 A. Correct.

18 Q. And in order -- what track -- do you have to cross a
19 track before you get to S track?

20 A. You have to cross 1 track.

21 Q. Okay, and when you cross 1 track, there's wood planks
22 there; right?

23 A. Yes, sir.

24 Q. Okay. On July 22nd, 2011, tell the jury where exactly
25 on those wood planks there was grease.

1 A. You want me to remember exactly like what spot from
2 five years ago today?

3 Q. Well, yes. You testified to the jury grease was
4 there, so one would think --

5 A. Well, there's a --

6 Q. Let me finish -- one would think that you would know
7 exactly where it was.

8 A. Well, there's a grease -- automatic greaser that
9 greases the switch which is not very far away. So when
10 trains come through, they drag, splatter spots of grease
11 everywhere. If you want, I can't sit here with a ruler and
12 say, oh, there's grease here and there's grease there.

13 Q. I understand that your testimony is at some point, you
14 may have seen grease. I'm talking about July 22nd, 2011.
15 Tell me where the grease was.

16 A. There was grease on the floor at some point.

17 Q. Where?

18 A. On the side of the rail, the side of the ballast, I'm
19 sure. I can't say specifically.

20 Q. Okay. So you do not actually know that there was
21 grease there; you're just giving general testimony of what
22 you may think had been there.

23 A. I guess so, if that's what you're saying.

24 Q. Okay. Great. Tell me where the water was on the
25 planks.

1 A. Water?

2 Q. Yes. Was there water on the planks?

3 A. Not that I recall completely, not like soaking wet.

4 Q. Okay. Great. Now, you gave testimony about having a
5 conversation with Darren -- his last name started with a Z?

6 A. Zebarowski.

7 Q. Zebarowski.

8 A. Yes.

9 Q. About, that he had talked to you about the condition
10 of the area could possibly be unsafe if the water level rose
11 high enough; right?

12 A. Yeah.

13 Q. How high was the water level on the day you fell?

14 A. Oh, it was nowhere near our conversation, if that's
15 what you're saying.

16 Q. No, I'm asking, on July 22nd, 2011 was there any
17 standing water on the ground to make the area dangerous?

18 A. It didn't rain that day, sir.

19 Q. So the answer's no?

20 A. The answer is no.

21 Q. Okay. So that whole conversation with Mr. Zebarowski
22 is irrelevant because there was no water there that day.

23 A. If you want to consider it irrelevant, sure.

24 Q. I mean, it wasn't a concern of yours because there was
25 no standing water to touch the third rail.

1 A. No, not on the specific day, but it's still a hazard,
2 yes.

3 Q. All right. So once you walked across the planks that
4 -- you don't even remember whether or not there's grease
5 there, you take a left, right, and walk towards the train?

6 A. Yes, sir.

7 Q. All right. And from when you take the left to when
8 you get to the train is about how far?

9 A. Approximately? Oh, from right when I take a left.

10 Q. Yes.

11 A. Maybe 10, 15 feet.

12 Q. Ten, 15 feet.

13 A. Approximately.

14 Q. Okay. Now, tell me where within that 10 to 15 feet
15 exactly there was grease.

16 A. Again, it's going to be the same as before.

17 Q. You can't do it.

18 A. I can't specifically tell you.

19 Q. Okay. So then it's entirely possible that there is no
20 grease there.

21 A. I would definitely not say that, 'cause I definitely
22 saw grease there, but --

23 Q. Do you have a specific memory on July 22nd, 2011
24 seeing grease there?

25 A. I told you, yes, but I can't tell you exactly where --

1 Q. Okay.

2 A. -- on what rock, what piece of ballast. I don't know
3 how to answer that question exactly.

4 Q. You can't give me any specifics besides, it was there,
5 but you don't know where: Close to the train, far from the
6 train, anywhere. You just want the jury to believe that it
7 was there without giving any specifics; correct?

8 A. There's an automatic greaser right there that the
9 trains drag through. It's kind of common sense, in a sense.

10 Q. Okay. So you're making an assumption it was there,
11 but you have no specific memory of it, do you?

12 A. I guess you're right, sure.

13 MR. ROSENTHAL: Objection.

14 THE COURT: I'll allow it.

15 Q. Now, at this point, you get to the train; right?

16 A. Yes, sir.

17 Q. And the conductor's already gone up.

18 A. Yes.

19 Q. So when you get to the train, do you pause for a
20 second, or do you just kind of go right up?

21 A. No, I mean, I pause for a second.

22 Q. Well, actually, let me ask you this. Are you carrying
23 anything when you walk to the train?

24 A. On this day?

25 Q. Yes.

1 A. No, because my stuff was at Hoboken, so I had my vest
2 on, that was it.

3 Q. When you say your stuff, what do you mean?

4 A. Like my extra stuff, my gas mask all that stuff. So I
5 had it in my locker in Hoboken that day, I believe.

6 Q. Okay. So you get to the train, and then, I'm sorry,
7 did you or didn't you pause for a second, or did you just go
8 right up?

9 A. No, I paused for a second.

10 Q. Why did you pause for a second?

11 A. Well, I always pause to look around, you know, get
12 everything situated before I go up. You just don't take a
13 running start onto the train.

14 Q. Okay. Fair enough.

15 During that pause, did you ever wipe your hands?

16 A. I don't remember.

17 Q. I mean, your hands were sweaty, right?

18 A. After the fact, I remember that, but I can't tell you
19 before if I did that or not 'cause if I did, I'd be lying to
20 you.

21 Q. I mean, because if you just kind of went like that,
22 your hands wouldn't have been sweaty anymore; right?

23 A. I guess in the sense, if that's what your saying.

24 Q. Okay. And your hands were sweaty, which you knew, but
25 you decided not to put the gloves on.

1 A. My hands were sweaty after. Could have been from
2 anything. That's what I remember. That's, you know --

3 Q. So you only remember your hands being sweaty after.
4 That's your testimony today.

5 A. I can't tell you like before the accident, you know,
6 what you're trying to get to, so --

7 Q. Really, I'm just asking you if your hands were sweaty
8 before the accident.

9 A. I don't remember at that point. Right before, I don't
10 remember, no.

11 Q. Okay. But you made the decision not to put your
12 gloves on.

13 A. Like I said, nobody wears their gloves.

14 Q. Okay. Yes, Mr. Avril lied about that, I remember.

15 A. Um-h'm.

16 MR. ROSENTHAL: Objection.

17 THE COURT: I'll allow it.

18 Q. Then you put your right foot in the foot hole; right?

19 A. Yes, sir.

20 Q. Okay. And then both hands on the grab bar?

21 A. Yes.

22 Q. Again, without the gloves?

23 A. Um-h'm. Again.

24 Q. And you pull yourself up?

25 A. Yes, sir.

1 Q. All right. Now, I wasn't quite clear from your
2 testimony yesterday.

3 A. Okay.

4 Q. Explain to me what happens when you place your left
5 foot on the anti-climber.

6 A. I placed my left foot and --

7 Q. How do you place your left foot?

8 A. Into the -- on the diamond plate, on the edge,
9 partially.

10 Q. Okay. Do you place it flat?

11 A. Yeah. Yeah. As flat as you're going to be able to
12 fully get it until you transfer your weight. You can't have
13 a flat foot at that height.

14 Q. Okay. Let me go back.

15 I'm asking specifically, that day, how did you
16 place your foot?

17 A. The way I place it every other time.

18 Q. Okay. And you're sure about that.

19 A. I'm positive.

20 Q. Or are you just giving a general answer based on what
21 you generally do?

22 A. No, I'm absolutely positive.

23 Q. Okay. So you place your foot flat.

24 A. Um-h'm.

25 Q. Right? How much of it's on the diamond plate?

1 A. Most of it, probably.

2 Q. I don't want a probably. I want how much of it is on
3 the diamond plate.

4 A. Most of my foot was on the diamond plate.

5 Q. Okay, and how do you know most of your foot was on the
6 diamond plate?

7 A. Because that's the way it's done. I've done it
8 hundreds of times, by now thousands.

9 Q. We'll do it this way. It might be a little bit
10 easier.

11 You put your foot in the foothold, you grab onto
12 the grab bars, you pull yourself up. At what point did you
13 look down at your left foot?

14 A. What.

15 Q. At what point did you look down at your left foot?

16 A. You don't look down as you're climbing up exactly.

17 Q. Okay. If you did not look down at your left foot, how
18 can you tell me that most of your left foot was on the
19 diamond plate or some of it -- let me finish -- or some of
20 it was on the smooth edge?

21 A. First of all, that would be looking over, not down.
22 You're -- the way you just described that instance would be
23 if I looked down when my foot is on the floor. You're
24 saying, how do I know if my foot was on the diamond plating,
25 right? Be more specific in your question, please.

1 Q. My question to you was, at what point in the process
2 do you look down at your left foot and see where it's
3 placed?

4 A. So now I'm already up with both feet, you're saying,
5 right, before I lifted my leg.

6 Q. I'm talking about at any time in the process.

7 A. Okay. So when my right foot is in that foot step, I'm
8 not looking down when my foot is on the floor.

9 Q. Sure.

10 A. Of course, when I look over, when I switch my -- move
11 my body, I'm going to see my foot because I have to look in
12 that direction anyway to see where I'm going, yes.

13 Q. So on that day, you saw your foot; right?

14 A. Of course.

15 Q. Most of it's on the diamond plate.

16 A. Yes.

17 Q. How much of it isn't on the diamond plate?

18 A. My heel.

19 Q. Your heel.

20 A. Yeah. About my heel.

21 Q. That's it.

22 A. Yeah.

23 Q. Okay. And when you pull yourself up, even though your
24 foot is flat, you say most of your weight is in the heel?

25 A. Well, at that point, yeah. Remember, I'm coming from

1 down, so I can't step over and be on my toes. It's almost
2 impossible. It's a high, high thing. So of course, most of
3 my weight is going to be in the center back of my foot, and
4 as soon as I transferred it, I slid.

5 Q. But the center of your foot's on the diamond plate.

6 A. From more or less, yes.

7 Q. And I wasn't quite sure from your testimony. On July
8 22nd, 2011, before you climbed up the train, did you see the
9 smooth metal edge?

10 A. No.

11 Q. You didn't look.

12 A. No.

13 Q. Okay. And then it's your testimony you planted your
14 left foot, and you slide.

15 A. Correct.

16 Q. Okay. I believe -- and actually, your testimony then
17 was, after the accident, while you were on the ground, is
18 when you saw that there was no anti-slip tape?

19 A. Actually more probably noticed it when I was getting
20 carried out on a stretcher more or less that I noticed
21 something, because I was looking around, like what happened.
22 I noticed it's shiny. I didn't say that I noticed there was
23 no anti-slip tape there. I just noticed that there was a
24 shiny edge. I couldn't tell for what reason it was shiny at
25 that time.

1 Q. Okay. When you're on the stretcher, are you laying
2 down or is it --

3 A. Yes, but I was -- remember, I'm on track -- they
4 walked me out on track level onto an elevated ground where I
5 was level with the train. I was actually above it at that
6 time, so I was able to see all of it.

7 Q. Where was the train in relation to you when it was on
8 the -- when you got up on the platform, or when you were
9 above it, as you just put it?

10 A. So if this is the platform, this is where the train
11 was, so when I fell off the train, I fell to the ground
12 track level.

13 Q. Sure.

14 A. They took me on a stretcher, carried me across the
15 same way I walked, back up the stairs, so now I'm exactly
16 parallel with the train.

17 Q. Okay. There was a track in between you from the
18 platform; right?

19 A. Correct.

20 Q. And you were actually in a neck brace; right?

21 A. Yeah, I was in a neck brace, sure.

22 Q. So that distance away, in a neck brace, you're able to
23 turn your head and say, ah, look at that, it's shiny.

24 A. It's only 10 feet.

25 Q. Okay. But you could still turn your head in the neck

1 brace; it's not a problem?

2 A. Sure, and I wasn't turning my head. I didn't have to.
3 It was right in front of me, in a sense.

4 Q. Now, when you get back -- and you can refer to
5 Defendant's Exhibit A that's in evidence.

6 A. Um-h'm.

7 Q. You filled out this 360 report?

8 A. Yes.

9 Q. I ask that you -- I think it's still up there -- that
10 you take a look at it, because we're going to go through it.

11 A. No problem.

12 I think this is it right here. Yes.

13 Okay.

14 Q. All right. You got it in front of you?

15 A. Yes, sir.

16 Q. All righty. So July 22nd, 2011, that wasn't your
17 first time filling out one of these reports; right?

18 A. No, sir.

19 Q. So you were, at least generally, even though it might
20 have been only one or two other times, familiar with what
21 this form looked like.

22 A. Yes.

23 Q. So you weren't --

24 A. In a sense.

25 Q. You weren't particularly caught off guard by any of

1 the questions or anything like that.

2 A. No.

3 Q. So you knew what you were going to have to fill out.

4 A. Yes.

5 Q. Okay. So when they ask you to describe the injury,
6 you write, "As I was climbing onto the train on S-1, I put
7 my right foot into the right foot step and grabbed hold of
8 the climbing rail. As I lifted my body up my right ankle
9 slipped and rolled over on me. I tried to hold on but due
10 to my hands being sweaty I couldn't hold on."

11 A. Correct.

12 Q. Now, if you want the jury to believe your testimony,
13 you left out the most important part of the accident on that
14 form.

15 A. I was also in a lot of pain, that I just got dragged
16 back from the hospital, so I filled out as quick as I could
17 so I could get out of there.

18 Q. So you filled it out and left out the part that caused
19 you to slip. That's what you want the jury to believe.

20 A. I also left out all of the conditions that are on
21 there that also could have happened.

22 Q. Oh, I understand. We'll get to that. But as far as
23 your left foot slipping, if people look at this form, no one
24 would understand your left foot slipped because you never
25 mentioned it; correct?

1 A. I guess so. Remember, I put to where I was in pain, I
2 wrote that generally, what happened, it was the leg I was
3 hurting on. I wanted to go home. I just got back from the
4 hospital at that point.

5 Q. Well, actually, if you want to go to "Describe
6 Injury," which is right above, it says, "open parentheses,
7 R, close parentheses, ankle sprained or torn ligament," next
8 line, "lower back pain."

9 So the pain didn't really prevent you from
10 accurately writing down which body parts were injured;
11 right?

12 A. I put a R with parentheses. I didn't write "right."
13 I just wanted to leave. And I'm no physician, so I couldn't
14 tell you exactly, I just gave a guess.

15 Q. Does R not stand for right?

16 A. It does. It's a shorthand verse for right.

17 Q. So you were able to identify that your right ankle got
18 hurt and your back, but the pain prevented you from writing,
19 right foot slipped?

20 A. Well, I didn't really write in a lot of things is what
21 I keep telling you. I was in pain. I left a lot of details
22 out on the form.

23 Q. Okay. Including the first thing that happened in
24 order to cause your accident.

25 A. But it wasn't causing -- that wasn't where my pain

1 was, so I left it out.

2 Q. But in your description of the accident, that doesn't
3 ask for, describe for me your pain in relation to how the
4 accident happened; it just says, describe how the injury
5 occurred. Right?

6 A. Correct.

7 Q. And so you left out the first step.

8 A. Along with a lot of other things.

9 Q. That's what you want the jury to believe, that you
10 left out the first step.

11 A. It's true, though.

12 Q. So the first document -- the first chance that you
13 have to tell someone at PATH what went on, you totally leave
14 out one foot slipping.

15 A. The first chance I had is just coming home from the
16 hospital two hours after my injury.

17 Q. When did your injury occur? What time?

18 A. I don't know. Two, three hours, now, you're going to
19 -- I don't know. However long it was, two hours, three
20 hours.

21 Q. Okay.

22 A. Whatever it is.

23 Q. So two, three hours after the injury, the first chance
24 to tell PATH, you decide not to tell them about the left
25 foot.

1 A. Like I said, I've been in pain. I wanted to leave at
2 that point. I wanted to go home.

3 Q. Okay. Now, you testified yesterday about, when it
4 came to the condition of the track level, your testimony
5 was, well, I was kind of inspecting, but it's not really my
6 job; I was looking around, but not really my job. Right?

7 A. I always look where I'm walking.

8 Q. Okay. But you did say that you inspected the train
9 before you went up.

10 A. Sure, visually.

11 Q. Okay. Go to the second page of this.

12 A. Okay.

13 Q. It asks: "Did you inspect the tool or equipment prior
14 to use?" And then there's boxes for Yes, No, or N/A, which
15 is not applicable.

16 A. Correct.

17 Q. And you checked off N/A.

18 A. It is not applicable. It's kind of, like I said
19 before, it's common sense. If there's no foot step or grab
20 rail, that is my only equipment, so obviously if it's
21 missing -- it's there, but it's kind of nonapplicable
22 because all trains have that. And if for some reason it was
23 missing, I would report that, yes.

24 Q. Okay. So is it not applicable, or did you do an
25 inspection?

1 A. It's kind of like on -- you're playing on a thin line
2 there. That's -- it's not really equipment in a sense, but
3 I use it to climb, so yes, I visually looked at it.
4 Otherwise I wouldn't have been able to use it.

5 Q. Right. How about the next question: "Did you inspect
6 the work site prior to beginning work?" Again, you check
7 off N/A.

8 A. Sorry, where is that?

9 Q. It's right below number one. It's number two.

10 A. Okay. Yeah. Yeah, I see it.

11 Q. Okay.

12 A. It's the same question as one, almost.

13 Q. Yes, and again, you check off N/A. You don't say,
14 yes, I inspected it and it was fine, or, there's something
15 wrong with it.

16 A. It's not like I'm inspecting a hammer before I'm using
17 it. It's the step and the handrail is the main thing you're
18 inspecting.

19 Q. Well, this question doesn't ask about tools, it asks
20 about the work site.

21 A. Right. Well, it's the same, the same exact thing.

22 Q. Okay. All right. And then when you go to number
23 four, where it asks you to identify the extenuating
24 circumstances, --

25 A. Correct.

1 Q. -- and then it actually provides examples of what they
2 might be, weather, temperature, lighting, noise, or coworker
3 activities, all you write in is that "Temperature was 110
4 degrees, possibly if it wasn't that hot my hands," quote,
5 "'might not have,'" close quote, "been that sweaty and might
6 have had better grip."

7 A. Correct.

8 Q. Right?

9 A. Um-h'm.

10 Q. So there was some testimony from you that it was --
11 the lighting was an issue and it was very dark.

12 A. Sure. There's a lot of things.

13 Q. You didn't write lighting in here even though you're
14 prompted in the question, an example is lighting; correct?

15 A. Correct.

16 Q. You also don't identify grip tape as a cause; right?

17 A. Correct.

18 Q. You don't identify grease as a cause?

19 A. Correct.

20 Q. You don't identify oil as a cause?

21 A. Correct.

22 Q. Right? So on the date of the injury, the only cause
23 that you identify, the only cause that you identify to PATH
24 is that your hands were sweaty; right?

25 A. Correct.

1 Q. All right.

2 MR. MINO: May I approach?

3 THE COURT: Yes.

4 Q. Mr. Foder, I'm going to hand you what's been marked
5 Defendant's Exhibit B. Take a look at it and let me know
6 when you're ready for some questions.

7 A. I already know. That's no problem. I see it.

8 Q. Are you ready?

9 A. I'm ready.

10 Q. All righty.

11 What is this document?

12 A. It's an Unusual Occurrence Report, basically the same
13 thing as the other one.

14 Q. Is that your handwriting on the document?

15 A. It is.

16 Q. Okay. Is that your signature at the bottom?

17 A. It is.

18 Q. Okay. And when did you fill that out?

19 A. The same time as the other report.

20 Q. Okay.

21 MR. MINO: Your Honor, at this time, PATH would
22 like to move Defendant's Exhibit E -- or B into evidence.

23 THE COURT: Any objection?

24 Okay. It's in.

25 (Defendant's Exhibit B marked in evidence)

1 Q. And are you asked to describe the incident on that
2 form?

3 A. Yeah, in a sense, sure.

4 Q. Okay. Read for the jury what you wrote in.

5 A. "As I was climbing onto the train on S-1 I put my
6 right foot in the right foot step, grabbed the handrail. As
7 I lifted my body up my right ankle slipped and rolled. I
8 tried to hold on but due to my hands being sweaty I slipped
9 and fell."

10 Q. Okay. Once again, no mention of the left foot; right?

11 A. And once again, I was in pain. Same time.

12 Q. So this is now the second opportunity you had to tell
13 PATH, and once again, you decide to not tell them about your
14 left foot slipping.

15 A. Correct.

16 Q. Okay.

17 A. Or anything else.

18 Q. Okay, great. So this is also the second opportunity
19 you have to identify that the edge of the anti-climber
20 didn't have grip tape, and once again, you declined to do
21 that.

22 A. Well, at that time, grip tape wasn't an issue until
23 now. They're slowly adding it.

24 Q. All right. You also don't identify in either of the
25 documents, either A or B, the alignment as being a problem,

1 right, the alignment of the grab bar and the end step?

2 A. Like I said, I could have wrote for hours. I was in
3 pain. I wanted to go home.

4 Q. So on the day of your injury, you decided the most
5 important thing to write as far as a cause of your injury
6 was sweaty hands.

7 A. I wrote that because when I was sitting there with the
8 operations examiner who picked me up from the hospital says
9 you have to put something in every box, I saw weather in the
10 thing, and it was hot, so I wrote it.

11 Q. Okay. But you also saw lighting in the thing and
12 decided not to write lighting.

13 A. Like I said, I wanted to go home.

14 Q. Okay. Now, to the extent based on your two reports
15 that you made to PATH the date of your injury that sweaty
16 hands were a problem, that would have just been cured by
17 putting the gloves on.

18 A. I just said it because that's what I remember, my
19 hands were sweaty after, so --

20 Q. That wasn't my question. That problem would have been
21 remedied by you putting your gloves on; correct?

22 A. It wouldn't have helped.

23 Q. Oh, so sweaty hands and gloves: Same exact thing.

24 A. My ankle was already rolled. No matter what, even if
25 I was glued to them bars, I was going to fall no matter

1 what.

2 Q. So if you were going to fall no matter what, why did
3 you write that your hands were sweaty as the cause of your
4 accident?

5 A. Because I had to put something in every box.

6 Q. And that was the --

7 A. The first thing that came to my mind, yes.

8 Q. -- most important thing -- okay.

9 Now, after your accident, right, you went up
10 eventually to Dr. Whitley?

11 A. Yeah. Yes.

12 Q. And that's the PATH Doctor?

13 A. Yes, sir.

14 Q. How long after your accident did you see Dr. Whitley?

15 A. I can't give you exactly.

16 Q. And by that, I mean when was the first time you saw
17 her after your accident?

18 A. Approximately, about five days, I believe.

19 Q. Okay. Couple days after your accident, about five,
20 you end up at the PATH doctor.

21 A. Yes, sir.

22 Q. And when you went to the PATH doctor, Dr. Whitley took
23 a history from you, didn't she? She asked you what
24 happened?

25 A. No. Not that I remember.

1 Q. Okay.

2 A. She just asked me what's wrong. She didn't ask me
3 incidents that I could recall.

4 Q. Okay. Do you recall telling Dr. Whitley that you
5 thought that you had grease on the bottom of your shoe which
6 possibly caused this fall?

7 A. I don't recall, but I could have said that, and that
8 could have been very well possible as well.

9 MR. MINO: May I approach?

10 THE COURT: What document are you showing him?

11 MR. MINO: This is Defendant's Exhibit H. It's
12 just to refresh recollection.

13 THE COURT: Okay.

14 Q. Actually, let me give you the marked copy.

15 I show you what's been marked as Defendant's
16 Exhibit H. Specifically, I'll draw your attention to what's
17 written under "Physician Note."

18 A. Okay. No problem.

19 Okay.

20 Q. Okay. In looking at this document, does this refresh
21 your recollection as to whether or not you told Dr. Whitley
22 that you thought that you had grease on the bottom of your
23 shoe which possibly caused your fall?

24 A. No. I -- like I said, I said that, sure, here, now
25 that you refresh my memory, and it's very possible. There's

1 grease all over that area.

2 Q. Now, you said after your accident -- actually, in the
3 two weeks after, immediately after your accident, how was
4 your ankle feeling?

5 A. I was still in pain.

6 Q. Okay. You were in a lot -- I believe your testimony
7 was that there was throbbing pain?

8 A. Sure, I had throbbing pain.

9 Q. Sure.

10 A. On and off. Pain, yes.

11 Q. Okay. Do you recall telling Dr. Whitley on July 28th,
12 2011, which would be less than a week after your accident,
13 that your right ankle was feeling better with pain only in
14 certain movements?

15 A. I told -- if it's on this paper, yes, that's what I
16 told her. But I was still in pain. It was just not as bad
17 as the exact moment I fell, sure.

18 Q. Okay. So you do remember telling her that you were
19 feeling better, pain only with certain movements.

20 A. Partially.

21 Q. It's not on that form.

22 MR. MINO: Your Honor, may I approach?

23 THE COURT: Yes.

24 MR. MINO: This is part of Plaintiff's Exhibit 9.

25 A. Like I told her, at rest, might have been a little bit

1 -- at rest, I would have less pain, obviously, than walking
2 on it or moving it, sure.

3 Q. Take a look again under "Physician's Note."

4 A. All right.

5 Q. And I'll ask you a question in a second.

6 A. All right.

7 Okay.

8 Q. Okay. In looking at that document, does that refresh
9 your recollection about what you told Dr. Whitley?

10 A. Perfectly.

11 Q. Okay. Now, on the note where you tell Dr. Whitley
12 about grease on your shoe, you don't -- again, you don't
13 identify any other problem; correct?

14 A. She was nobody to tell. She's there to treat me.

15 Q. All right. So at some point -- or actually, how long
16 after your injury did you end up in physical therapy? When
17 was the first time you went?

18 A. I don't remember exactly.

19 Q. Was it six months later, or was it only a couple weeks
20 after?

21 A. It was probably a few weeks. I don't remember
22 exactly. You I guess know better than I would right now.

23 Q. Did you go to Kessler Rehab?

24 A. I did.

25 Q. Okay. And during your August 1st, 2011 visit, which I

1 guess was your initial visit, did you identify the severity
2 of pain in your ankle as one out of 10?

3 A. I don't recall.

4 Q. Okay.

5 MR. MINO: May I approach?

6 THE COURT: Yes.

7 MR. MINO: This is part of Plaintiff's Exhibit 17.

8 THE COURT: Okay.

9 Q. Okay. I'm going to direct your attention to just
10 under "Chief Complaint."

11 A. Um-h'm.

12 THE COURT: What document is that again?

13 MR. MINO: It is an August 1st, 2011 note from
14 Kessler Rehab. It's part of Exhibit --

15 THE COURT: D-4?

16 MR. MINO: No, it's Plaintiff's Exhibit 17.

17 THE COURT: Oh, 17. Okay.

18 MR. MINO: Yes.

19 Q. Are you ready?

20 A. I'm ready.

21 Q. Okay. So in looking at that note, does that refresh
22 your recollection that by August 1st, when you went to
23 Kessler Rehab, that your pain in your ankle was one out of
24 10?

25 A. Sure.

1 Q. And also during that first visit, isn't it true that
2 you told the individuals at Kessler Rehab that you fell
3 because of grease on the track?

4 A. I might have mentioned that, yes.

5 Q. Can I see the document back just so I can show you at
6 a point?

7 If you look at what's written in under "History of
8 Injury." Take a look at that.

9 A. Sure.

10 Q. Okay.

11 A. I see it.

12 Q. Does that refresh your recollection that you told the
13 physical therapist at Kessler Rehab that you fell because of
14 grease on the track?

15 A. I gave everybody a general idea of what happened. I
16 didn't go into every single detail of the whole accident.

17 I was also in a cam walker boot, so it made things
18 a little bit less painful for me because it took a lot of
19 stuff off my ankle.

20 Q. Okay. So you gave them a general idea, but again, you
21 leave out any mention of the anti-climber or the grab bar or
22 the in step.

23 A. Or the lights or anything else. I could go on and on
24 and on and on and on, but why tell strangers these things.

25 Q. Okay. You didn't find it important to be as open and

1 forthright with your doctors as possible?

2 A. Why would I? My left foot was not injured. My right
3 foot was injured.

4 Q. All right. Now, your first surgery, your surgery with
5 Dr. Berberian, --

6 A. Correct.

7 Q. -- when did that take place?

8 A. I can't give you a date. I don't remember.

9 Q. Sometime in September of 2011 sound about right?

10 A. I guess. I don't know. You have it right there. You
11 know better than I do.

12 Q. Now, sometime -- within a month of your first surgery,
13 you actually fell on that ankle again, didn't you?

14 A. Not that I recall falling, no. Not a full, like,
15 fall.

16 Q. Okay.

17 MR. MINO: May I approach?

18 THE COURT: Yes. Tell me the number.

19 MR. MINO: This is part of Plaintiff's Exhibit 12.

20 THE COURT: Okay.

21 Q. Do you recall telling Dr. Berberian on August 25th,
22 2011, that you fell on the ankle once?

23 A. Yeah, I think I was in my boot or cam walker, I was on
24 my crutch. I think I placed it down a little bit too hard
25 or something like that. But I was already -- I was in a

1 cast. I was mobilized, I believe, at that time. Yeah, I
2 believe so.

3 Q. So you do remember telling him that you fell --

4 A. A little bit, vaguely, very vaguely. I don't remember
5 the whole thing. This is five years ago.

6 Q. All right. Well, here, take a look at this note.

7 Mr. Foder, based on that note, does that refresh
8 your recollection about whether or not you told
9 Dr. Berberian that you fell on your ankle after the surgery?

10 A. Yeah.

11 Q. And then, by November --

12 A. Hold on one second.

13 Q. Yes.

14 A. Yeah, I was in a cast.

15 Q. Okay. By November of 2011 --

16 A. Okay.

17 Q. -- at this point, you're still seeing Dr. Berberian?

18 A. Yeah, I believe so. Sure. My surgery was just a
19 little prior, right?

20 Q. Yes.

21 A. Okay. Yeah. I was still seeing him.

22 Q. And so by November 2011, you actually tell
23 Dr. Berberian that you're doing well.

24 A. Sure. I was -- as well as I could be at post-op.

25 Q. Okay. So six weeks from surgery, you're doing well.

1 A. I guess so. In pain, painkillers, but I'm doing well
2 for my situation, sure.

3 Q. Okay. Now, when did you -- after the first surgery,
4 when did you stop seeing Dr. Berberian?

5 A. I don't recall exactly dates. I don't recall.

6 Q. But at some point after the first surgery, when you
7 returned to work with PATH the first time --

8 A. Right.

9 Q. -- you weren't treating with Dr. Berberian throughout
10 that period; correct?

11 A. No, I was in therapy or something on and off, and then
12 I wound up going back to Dr. Berberian.

13 Q. Right, and when did you go back to Dr. Berberian?

14 A. I can't tell you exactly dates and --

15 Q. Can you tell me the year?

16 A. Yeah. I think it was a year later from that surgery.

17 Q. So in 2012 or 2013?

18 A. I don't know. '12, I guess.

19 Q. And why did you go back to Dr. Berberian in 2012?

20 A. Pain.

21 Q. And was that when you then sought out -- is that when
22 he told you to have another surgery?

23 A. I believe so. I can't -- I don't know -- I can't
24 remember every single detail. I've seen so many doctors.

25 Q. Okay. So at some point, you end up with

1 Dr. Greisberg.

2 A. Correct.

3 Q. Right? And that would have been in October 2013;
4 correct?

5 A. I believe so.

6 Q. Do you remember in October 2013 telling Dr. Greisberg
7 that you exercise regularly?

8 A. Yeah, my therapy, I do a lot of therapy, sure, yeah.

9 Q. Not that you do therapy regularly, that you exercise
10 regularly.

11 A. I think he was talking about my home exercises is what
12 I believe he was talking about, but this is a long time ago.
13 I don't remember exactly the conversation we held.

14 Q. Okay. And your second surgery with Dr. Greisberg is
15 on Halloween 2013?

16 A. I believe that was it, yes.

17 Q. Okay. And then again, six weeks after the surgery, do
18 you recall telling Dr. Greisberg that, again, you're not in
19 much pain and that you're doing well?

20 A. Again, I was mobilized in a cast on painkillers, so at
21 that time, that's what the answer is.

22 Q. Okay. So, again, six weeks after the injury, not in
23 much pain.

24 A. I was in pain, but on painkillers and immobilized, not
25 using my ankle whatsoever.

1 Q. And then you testified before that you were only
2 really able to run if like your daughter's running out into
3 the street or something like that.

4 A. Yeah, I can't fully sprint now, no.

5 Q. Okay. Only when you really need to. Right?

6 A. I guess.

7 Q. Okay.

8 A. I mean -- I mean, I might have had once or twice where
9 I've attempted to do it, but no, I don't do it regularly.

10 Q. Okay. And you said you could barely jog for even that
11 long, right?

12 A. Not for a long time, no.

13 Q. Okay. Do you recall in January 2014 telling
14 Dr. Greisberg that you are doing a tiny bit of jogging
15 or using the elliptical machine?

16 A. This is what they recommended me to try to do, sure.
17 This is what Dr. Greisberg told me to do.

18 Q. So by 2014, that's what you're doing.

19 A. This is what he told me to do, but when I tried it and
20 when I went back to tell him that I couldn't do it, I was in
21 pain, and I only tried to do it in moderation here and there
22 because he wanted me to try to build some fluid into my
23 ankle.

24 Q. So how often are you jogging and using the elliptical
25 machine?

1 A. I tried it a couple times. I don't remember exactly.

2 Q. Okay. Now, eventually, there's a third surgery with
3 Dr. Greisberg; right?

4 A. Yes, sir.

5 Q. And that is November 2014.

6 A. I believe so.

7 Q. Okay. Now, that third surgery, they're not going in
8 and cutting the bone again; right?

9 A. I'm not a physician. I don't know. I know they took
10 the hardware out. I was in pain. That's all I remember.
11 They was cutting into my ligaments.

12 Q. Okay. So do you recall telling Dr. Greisberg less
13 than two weeks after that surgery that you're feeling pretty
14 good and you can weight-bear on it?

15 A. I don't recall, but if I was, I think I was in a can-
16 walker and on painkillers, so...

17 MR. MINO: This is part of Plaintiff's Exhibit 11.

18 May I approach?

19 THE COURT: Yes.

20 Q. Okay. I'm going to show you this note. Take a second
21 to read it, under "History."

22 A. No problem. No problem.

23 Okay.

24 Q. And does that refresh your recollection that less than
25 two weeks after the surgery, you told Dr. Greisberg that

1 you're doing --

2 A. Sure. Do you want me to read it for everybody?

3 Q. No, I just asked if it refreshed your recollection.

4 A. It refreshes my recollection, sure.

5 Q. Now, you haven't seen Dr. Greisberg since March of
6 2015; right?

7 A. I believe so. Again, the dates --

8 Q. Okay. So it's been more than a year since you've saw
9 him.

10 A. Sure.

11 Q. Did you see any other orthopaedic doctor since then?

12 A. Not that I recall.

13 Q. Did you see anyone -- or not anyone. Did you see any
14 doctor in relation to your right ankle since March of 2015?

15 A. Not that I recall, unless therapists count. I don't
16 think they do.

17 Q. Okay. Are you currently wearing a foot orthotic?

18 A. Me?

19 Q. Yes.

20 A. I have to wear an ankle brace probably forever.

21 Q. Okay. Are you wearing it now?

22 A. Yes.

23 Q. Do you always wear it?

24 A. Depends on the situation. But not like if I'm -- not
25 just -- if any time I'm leaving the house for a good amount

1 of time, sure, I'd wear it.

2 Q. Okay, but there's certain times during the day where
3 you do not wear it; correct?

4 A. Yeah.

5 Q. Okay. Now, I want to talk to you about some of the
6 stuff you said with respect to your home.

7 A. Okay.

8 Q. Okay?

9 If you said you lost your home, it's fair to say,
10 then, that you didn't own it?

11 A. Yeah, I didn't own it. It was a rent with option to
12 buy.

13 Q. Okay. How much was your rent per month?

14 A. Per month, it was \$1,650, 1,700.

15 Q. Okay.

16 A. Plus everything else.

17 Q. Okay. And by "everything else," you mean what?

18 A. All your other utilities, electric, cable, gas, water,
19 sewer, whatever.

20 Q. So can you give me an estimate of how much the rent
21 plus utilities would be per month?

22 A. I don't know. Somewhere over 2,000, 22, 2,300. Plus
23 I had car payment, I had to buy all stuff for my daughter,
24 she was a newborn. So everything added up.

25 Q. Okay.

1 A. I don't know total what it could have been I was
2 spending at the time.

3 Q. I was just asking in relation to the house.

4 A. Yeah. I don't know. I don't know exactly. I didn't
5 have any figures that I wrote down prior to coming here,
6 so...

7 Q. Okay. Was your fiancée working at the time?

8 A. She was.

9 Q. Okay. How did you guys -- or did you guys divvy up
10 the rent? You pay half, she pays half, or what happened
11 there?

12 A. I made more money than she did, so I paid as much as I
13 could for everything. She just kind of makes minimum wage
14 at the time, she wasn't making that much money.

15 Q. Okay. So --

16 A. And at that time, I'm not even sure if she was back to
17 work yet.

18 Q. Okay.

19 A. I'm not sure.

20 Q. Why was she out of work?

21 A. Well, she had a child.

22 Q. Okay. When was your daughter born?

23 A. January 29th.

24 Q. Of?

25 A. 2011.

1 Q. 2011. Okay. So your testimony was before that this
2 injury put a lot of financial stress on you and you ended up
3 losing the house.

4 A. Yeah.

5 Q. Okay. And did you end losing the house because you
6 stopped paying rent?

7 A. Correct.

8 Q. Okay.

9 A. Well, I left him with my security deposit. I didn't
10 leave him high and dry. So the money that he had, I just
11 said, listen, I'm going to leave early, take this, and we
12 separated ways, because I didn't want to just leave him
13 stranded like, you know. But, yeah, I had to. I had no
14 other choice. I didn't have enough income at the time.

15 Q. Were there any months before you left that you just
16 didn't pay rent?

17 A. Not that I recall, no.

18 Q. Okay. So just so I'm clear, you paid the landlord in
19 full, but you ended up leaving early?

20 A. From my recollection, yeah, I remember that I couldn't
21 afford it with all my other bills.

22 Q. Okay. And when did you leave that house?

23 A. I don't remember the month.

24 Q. Can you give me a year?

25 A. It was after the surgery.

1 Q. Which surgery?

2 A. After my first surgery, so six months, seven months
3 after, something like that. I don't -- I don't recall
4 exactly.

5 Q. So by 2012.

6 A. I believe so.

7 Q. Okay. Now, isn't it true, though, that during your --
8 initially after the injury, right, when you were not
9 working, --

10 A. Initially after the injury, correct.

11 Q. Right, you were not working, PATH paid you your entire
12 paycheck?

13 A. Initially after the injury.

14 Yeah. For four weeks, I believe, I got paid.

15 Q. So for four weeks where you were not working at all,
16 you received your entire paycheck.

17 A. Only for the first surgery, though.

18 Q. I understand. So for the first surgery, we're talking
19 about for the first four weeks after the first surgery --

20 A. Yes, I got paid for a month, yes.

21 Q. Yes.

22 A. One month.

23 Q. And how much was that?

24 A. Whatever my paycheck was times four, so -- maybe it
25 was 900 times four, something along those lines. I can't

1 give you exact dollar amount because then I'd be lying,
2 so...

3 Q. And then after those first four weeks, PATH paid --
4 where you're still not working, PATH paid you half your
5 paycheck; right?

6 A. Yes, for a couple of remainder, some weeks, sure.

7 Q. So with respect to the financial hardship, for a while
8 there, you were collecting a paycheck without working.

9 A. For a little while.

10 Q. Okay. Did you save that money?

11 A. As much as I could to put into my bills. Remember, I
12 had a newborn, too, so, and they're not exactly the cheapest
13 thing, either.

14 Q. Now, isn't it also true that you were collecting money
15 from the Railroad Retirement Board while you were out and
16 not working?

17 A. Yes, but that's the difference. My check, what
18 happens is is that every day after the first week that I'm
19 out, they take \$60 out of my check. They sent it to
20 Railroad Retirement. So I'm not really getting two, I'm
21 getting the same initial dollar amount, just from two
22 separate places because my money's being sent.

23 Q. Okay.

24 A. Yeah.

25 Q. So you are, though, collecting money from the Railroad

1 Retirement Board.

2 A. Sure.

3 Q. Okay. Now, how about after the second surgery?

4 A. Yeah.

5 Q. PATH paid you then as well, didn't they?

6 A. Yeah, but it's a different circumstance.

7 Q. Okay. And were you also collecting from the Railroad
8 Retirement Board then?

9 A. Yeah, it would be the -- it would be similar to the
10 first time except for one -- I couldn't claim the IOD,
11 which, you know, you can't be out of work injured for the
12 same reason and collect the same way. The way they do their
13 paychecking is weird, but...

14 Q. Okay. But fair to say, then, after the second
15 surgery, for a period of time, you were also collecting
16 money from two sources.

17 A. Yeah, but it's still my regular check only for X
18 amount of time. It's a short period.

19 Q. And after your third surgery --

20 A. Correct.

21 Q. -- PATH pays you again, don't they?

22 A. Yes, for the first four weeks.

23 Q. After the second and third surgery, PATH pays you
24 again, you're not working and you're collecting money from
25 PATH; right?

1 A. Correct.

2 Q. And again, after the third surgery, did you get money
3 from the Railroad Retirement Board?

4 A. The same way as before. It's the same exact money
5 just coming from two different places.

6 Q. Okay, so again, after each surgery, you were able to
7 collect money from two different sources while not working;
8 correct?

9 A. Technically, two different sources, yes.

10 Q. So you're back at full duty now; right?

11 A. Yes, sir.

12 Q. Okay. You don't have any work restrictions; correct?

13 A. No, sir.

14 Q. All right. There's nothing that they say, you know,
15 Mr. Foder can't do this, he can only do that?

16 A. No. I can do it all.

17 Q. Okay. Did you ever go to PATH and say, I can't work
18 this?

19 A. No.

20 Q. Did you ever go to PATH and say, don't put me on a
21 switching job, I can't physically do it?

22 A. I can't do that because they would just take me out of
23 my craft. They won't allow me to work. If I can't work one
24 particular part of that job, I can't work any of it. So, in
25 my seniority, I have the option to pick a running or a

1 switching job, and I choose to pick something that is less
2 strenuous on my ankle.

3 Q. At the time of the injury, which one were you working?

4 A. I was working a running job.

5 Q. Okay. How long had you been working a running job
6 prior to July 22nd, 2011?

7 A. I don't remember. Not that long. I don't think I --
8 I think I was switching prior to that. I can't tell you
9 exactly. We changed jobs so much, every three months, I
10 couldn't tell you.

11 Q. So at least a couple of months before July 22nd, 2011,
12 you had started working a running job?

13 A. Yeah, I'm sure I had a switching job in there
14 somewhere, yeah.

15 Q. Okay. Now, there was a little bit of testimony about
16 overtime.

17 A. Okay.

18 Q. And you said that you averaged about two hours a week?

19 A. I said I worked maybe one to two days a month.

20 Q. And then when Mr. Rosenthal asked you, he averaged it
21 out, saying about two hours a week?

22 MR. ROSENTHAL: Objection.

23 A. I guess that's what he came to his conclusion, maybe.

24 THE COURT: What's the objection?

25 MR. ROSENTHAL: A mischaracterization of what I

1 said.

2 THE COURT: I'll allow it.

3 Q. So it ends up averaging out to about two hours a week?

4 A. Yeah.

5 Q. About?

6 Mr. Avril said that overtime was a speculative
7 thing, it wasn't guaranteed. Was that true or not?

8 A. That's true.

9 Q. Okay, so that -- told the truth on that one.

10 So there were plenty of weeks where you didn't
11 work overtime; right?

12 A. Yeah, there was a lot of times I didn't get called or
13 offered it, either.

14 Q. For the periods of time you were out, how was overtime
15 assigned to you?

16 A. When I'm out like of work?

17 Q. Would overtime be assigned to you when you're out of
18 work?

19 A. No.

20 Q. No. I understand that.

21 So in 2011, for the periods of time you were
22 there, how would overtime be assigned?

23 A. Well, there is a roster of names, and then it goes by
24 tours. Everybody's job finishes at different minutes, so,
25 like -- it's very complicated, but they go down the roster,

1 per tour, either you're a.m., p.m., midnight. The guys on
2 the a.m. would get the preferred a.m. overtime jobs, p.m.,
3 you know, and so on and so forth, but then it gets down to
4 the minute. It's really complicated how they do it
5 upstairs. All I know is generally it's on a rotating roster
6 is the best that I can describe it.

7 Q. When you say on a rotating roster, what do you mean?
8 Do they try and keep everyone within that roster relatively
9 even as far as the amount of overtime?

10 A. No, it starts at the top and then it goes down.

11 Q. So it's a seniority thing.

12 A. Basically, yes.

13 Q. So in 2011, since you had only been an engineer for a
14 couple of months, is it fair to say you would have been
15 relatively low on the seniority list?

16 A. Yeah, that's absolutely right.

17 Q. So you would have gotten offered less overtime than
18 someone who was much higher up on the seniority list.

19 A. Absolutely.

20 Q. Now, when you're offered overtime-- the reason I say
21 offered, you're not required to work it; right?

22 A. No, sir.

23 Q. They can't say to you, Steven, you have to stay and
24 work this overtime.

25 A. Well, they can force you on certain, whenever -- if

1 they need you. But no, on most cases, you're right.

2 Q. Okay. And prior to this injury, there were instances
3 where you were offered overtime and you declined to work it.

4 A. Absolutely.

5 Q. And what would some of those reasons be?

6 A. Some of them reasons could be either I just wanted to
7 be with my daughter or family, or I had a family birthday
8 party, or I had something going on that, you know, was more
9 prevalent to me being there for overtime. You know, I like
10 to be around my family a lot, too, so a lot of that could be
11 it.

12 Q. Okay.

13 A. I worked when I could.

14 Q. Well, you're able to be back and work overtime now.

15 A. Yes, sir.

16 Q. At any point prior to July 22nd, 2011, did you ever
17 make a written report to a PATH supervisor regarding the
18 alignment of the grab bars on the PATH train?

19 A. No, sir.

20 Q. Okay. Even though you climb them every day.

21 A. Yes, sir.

22 Q. And even though you're required to report all unsafe
23 conditions.

24 A. Yes.

25 Q. Prior to 22nd, 2011, did you ever report in writing to

1 a supervisor anything about the edge of the anti-climber?

2 A. No, sir.

3 Q. Even though you're required to report all unsafe
4 conditions.

5 A. Yes, sir, that was -- I wasn't aware.

6 Q. Even though you're required to -- you climbed that
7 hundreds of times prior to July 22nd, 2011.

8 A. Yes, sir.

9 Q. Okay. And despite -- actually, did you ever make a
10 written report prior to July 22nd, 2011 about there being
11 grease in the track area by S track?

12 A. Not to my recollection, no.

13 Q. Even though you're required to report all unsafe
14 conditions?

15 A. Yes.

16 Q. Okay?

17 MR. MINO: I have nothing else.

18 THE COURT: Okay. You know what? It is quarter
19 to 12. Why don't we take our morning break? I know you
20 have been very patient, the jury has been. I appreciate it,
21 and I know they probably need a quick break to use the
22 restrooms and get something to drink or eat, so why don't we
23 -- it's a quarter of. Why don't we resume at 12 o'clock?
24 Then we'll see if we can finish with the witness. Okay?

25 All rise.

1 THE COURT CLERK: All rise.

2 (The jury exits)

3 THE COURT: Okay, guys. Take a break. See you
4 soon.

5 Thank you, Mr. Foder. You'll be back. You're not
6 done yet.

7 THE WITNESS: Thank you. I know.

8 (Recess taken)

9 (Jury out)

10 THE COURT CLERK: All rise.

11 THE COURT: Bring in the jury.

12 How much do you think you'll have with Mr. Foder?

13 MR. ROSENTHAL: I'm only going to have a couple of
14 questions.

15 THE COURT: Okay, good, and then we're going to go
16 right into your expert, correct?

17 MR. ROSENTHAL: We have our expert here, ready to
18 go.

19 THE COURT: Excellent.

20 How long is the video?

21 MR. MINO: It's an hour and 19 minutes, although
22 actually slightly shorter because we're cutting it down, but
23 only by like a minute or two.

24 MR. ROSENTHAL: Yes, but I would say an hour and
25 20 minutes.

1 THE COURT CLERK: All rise.

2 (The jury enters)

3 (The witness resumed the stand.)

4 THE COURT: All right. Welcome back, everyone.

5 Mr. Foder, you can have a seat. You remain under
6 oath.

7 Mr. Rosenthal?

8 MR. ROSENTHAL: Thank you, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. ROSENTHAL:

11 Q. Steve, I just have a couple of questions for you.

12 A. Sure.

13 Q. You were asked questions about sums that you received
14 while you were out the three times.

15 A. Sure.

16 Q. Each time that you were out -- I guess there was three
17 times; right?

18 A. Yes.

19 Q. You got -- you testified, I think -- you got how much
20 full pay and for how long?

21 A. I got one month worth of full pay.

22 Q. And how much was that?

23 A. I don't know. In four weeks?

24 Q. No, per week, at the time.

25 A. Around eight-something, \$900.

1 Q. And then after that, you got -- you still got paid,
2 but a lesser amount?

3 A. I got half of that for the following eight weeks after
4 that.

5 Q. And then after that?

6 A. Nothing.

7 Q. So at the time that you were losing your house, was
8 there any money coming in from PATH?

9 A. No.

10 Q. Now, you also testified about something called
11 Railroad Retirement benefits.

12 A. Yeah, in my pension fund.

13 Q. And how much was that bringing in to you?

14 A. It was approximately \$598 every two weeks, I believe,
15 or 596.

16 Q. Okay. So about 200 and something dollars a week?

17 A. About that, yeah, two and change, yeah.

18 Q. That's what you were getting at the time that you --
19 that's all that was coming in for you at the time that you
20 lost your house?

21 A. That's it.

22 Q. And for each time that you were out for the four
23 months till you went back to work, that was the only money
24 that you had?

25 A. That was it, yeah.

1 MR. ROSENTHAL: No other questions, Your Honor.

2 THE COURT: Are we done?

3 MR. MINO: Just one question.

4 RECROSS EXAMINATION

5 BY MR. MINO:

6 Q. The last time -- isn't it true that the last time you
7 went out, you actually never went no pay, you were full and
8 half pay the entire time?

9 A. I don't recall.

10 Q. So it's your testimony that you went into no pay.

11 A. I don't recall exactly the dates.

12 Q. You don't know one way or another.

13 A. No, I'm not sure. I'm pretty sure no, but...

14 MR. MINO: I have nothing else.

15 THE COURT: Okay. Thank you, Mr. Foder.

16 THE WITNESS: Okay.

17 (Witness excused)

18 THE COURT: Your next witness.

19 MR. ROSENTHAL: Plaintiff calls George Widas.

20 THE COURT: Mr. Widas?

21 Mr. Widas, do you swear or affirm?

22 THE WITNESS: Swear.

23 THE COURT: Okay.

24 THE COURT CLERK: Sir, if you can raise your right
25 hand, place your left hand on the bible, please.

1 G E O R G E W I D A S, called as a witness on behalf of
2 the Plaintiff, and having been duly sworn, testified as
3 follows:

4 THE COURT CLERK: Please state your full name for
5 the record and spell it, please.

6 THE WITNESS: George P. Widas, W-i-d-a-s.

7 DIRECT EXAMINATION

8 BY MR. ROSENTHAL:

9 Q. Mr. Widas, can you tell the jury what your occupation
10 is?

11 A. I'm a professional engineer, and I practice as an
12 independent consulting forensic engineer.

13 Q. And what does it mean to be an independent consulting
14 forensic engineer?

15 A. I'm hired on a case-by-case basis. I'm not employed
16 by anybody.

17 Q. And what is forensic engineering?

18 A. Forensic engineering is the use of physical sciences,
19 engineering sciences to figure out what happened and why in
20 different events. For the sake of analysis, in other words,
21 it's the same sciences and engineering that you use to build
22 things. You use the same stuff to take it apart.

23 Q. And how long have you been working in consulting
24 engineering?

25 A. Since 1967. Forty-nine years.

1 Q. And what about your professional training as it
2 related to the engineering you did in this case?

3 A. I have a Bachelor of Science cum laude Tau Beta Pi
4 from Syracuse University in civil engineering, which
5 included courses related to the work I did in this case,
6 physics, mechanics, vector analysis, engineering materials,
7 biology, photogrammetry, climatology, surveying. After I
8 graduated from college, I've taken continuing engineering
9 education courses for credit for the last 40 or more years
10 in the fields of scientific event reconstruction, safety
11 engineering, safety engineering techniques, safety sciences,
12 human factors in ergonomics, biomechanics, cognitive
13 neuroscience, hazard analysis, risk assessment, safety
14 systems, safety system management, safety program
15 techniques, various different code compliances, including
16 the American Disabilities Act code compliance, OSHA
17 compliance, general safety regulations for OSHA,
18 OSHA-certified, fall protection, OSHA-certified, and I have
19 taken many programs in slips and fall events.

20 Q. What is safety engineering?

21 A. Safety engineering is a science which is the procedure
22 that should be followed to make systems safe for people to
23 use.

24 Q. And what does the word "safety" mean to professionals
25 in your field?

1 A. The sciences of safety engineering reduce the risk of
2 harm to acceptable levels. That's what safety is defined as
3 scientifically.

4 Q. Is there a simple way for you to explain to us the
5 science of safety engineering?

6 A. It's basically a four-step process.

7 The first step is hazard analysis, where you make
8 a list of what can go wrong that might hurt people or damage
9 property.

10 The second step is to do a risk assessment, where
11 you take that list of potential methods of harm and you
12 prioritize it and figure out what you actually have to do
13 something about, or whether your list included items that
14 just don't need your attention because they're unlikely to
15 occur and the consequences of them occurring are remote.

16 Once you've done the hazard analysis, make your
17 list, do the risk assessment, and prioritize the list, you
18 identify hazards of significant risk, if there are any.
19 Once you've done that, you mitigate or do something to make
20 those dangerous conditions safe, and there's a procedure to
21 be followed when you do that, and it is to eliminate the
22 hazard if you can; if you can't do it, can't eliminate it,
23 you protect the user or separate the user from the hazard.
24 If you can't do either of those two things, then you warn
25 about it.

1 And the fourth level of hazard mitigation is to
2 train and rely upon the user to protect themselves in the
3 system.

4 Q. How does the science of physics relate to the work you
5 did in this case?

6 A. Physics talks about forces, vector analysis, friction,
7 and materials science that would relate to a climb system,
8 the forces that are exerted on the climb system and on the
9 people using the climb system, and the traction demands at
10 the points of contact while using the climb system.

11 Q. What is the science of biomechanics?

12 A. Biomechanics is the science where a human body is
13 studied as a machine or a mechanical device. Your bones are
14 the beams or structure, your muscles are the motors, your
15 tendons and ligaments are the connectors, and your brain is
16 the computer. Cognitive neuroscience specifically studies
17 the part of that program where it relates to your function
18 of your brain.

19 Q. How does the science of biomechanics relate to the
20 work that you did in this case?

21 A. It tells us how people will fit and function in the
22 climb system on the railroad car.

23 Q. What is the science of human factors?

24 A. Human factors provides data for the performance of
25 humans in the built environment. In other words, once you

1 create something, a building or a railroad car, and people
2 are going to use it, human factors gives you the data to fit
3 people in that system.

4 Q. How does the science of human factors relate to the
5 work you did in this case?

6 A. Tells us how big people's feet are, what the range of
7 motions of their joints are as they're climbing, and factors
8 like that.

9 Q. What is the science of ergonomics?

10 A. Ergonomics is the study -- the application of human
11 factors to the work environment.

12 Q. How does the science of ergonomics relate to the work
13 you did in this case?

14 A. This is a workplace safety issue. The railroad
15 workers are using the railroad car and they're climbing the
16 railroad car, so this is an ergonomic issue.

17 Q. What is professional scientific event reconstruction?

18 A. That is the application of science to facts available
19 in a particular case to make a determination of what
20 happened and why.

21 Q. Have you done any engineering work related to
22 workplace safety?

23 A. I have.

24 Q. And what have you done?

25 A. First starting with design work in 1967, and I ended

1 my design work in 1994, through all of that time, all of the
2 systems that I designed had to be safe for the user.

3 In addition to that, starting in 1980, I devoted a
4 portion of my forensic -- of my consulting engineering
5 practice to forensic engineering, 1994, all forensics since
6 then, and started focusing on the actual safety of workplace
7 safety.

8 And to do that, I sit on safety committees and
9 write safety standards for the world at the American Society
10 For Testing and Materials, and in addition to that, I've
11 analyzed many different fall -- or workplace safety events,
12 several hundred over the last 36 years, 37 years.

13 Q. Have you done any engineering work directly related to
14 the safety of climbing systems in the workplace?

15 A. Yes. I would estimate about a hundred of the events
16 that I've looked at through the years would involve climb
17 systems in the workplace.

18 Q. Have you done any engineering work where people were
19 injured in a workplace in the railroad world?

20 A. I would -- yes, I have. I would say I've done maybe a
21 hundred railroad injury event investigations over the years.

22 Q. Now, are the sciences you rely upon to do your
23 analysis different when the workplace is a railroad or some
24 other workplace?

25 A. No. As a safety professional, safety is safety,

1 physics is physics, human factors is human factors, whether
2 it's a railroad or an industrial plant where there is a
3 punchpress making parts for a transmission in a car.

4 Q. How many times in the last 37 years have you studied
5 and rendered opinions in workplace safety in general?

6 A. A few hundred times.

7 Q. And how many times in the last 37 years have you
8 studied and rendered opinions on workplace safety in the
9 railroad world?

10 A. Somewhere between 50 and 100 times, I would say.

11 Q. What professional affiliations have you established
12 during your career?

13 A. I'm a member of the American Society of Safety
14 Engineers, the American Society of Civil Engineers, the
15 Society of Automotive Engineers, the Human Factors and
16 Ergonomics Society, the American Society For Testing and
17 Materials, the National Safety Council, the International
18 Code Council, the American Meteorological Society, and other
19 organizations.

20 Q. How does your membership in those professional
21 organizations help the jury to understand your
22 qualifications as a professional engineer, safety
23 professional, and human factors professional?

24 A. The different professional societies offer grades of
25 membership based on your training and experience. You

1 submit applications, and they review that and award a grade
2 of membership. I'm recognized as a professional in each of
3 those fields.

4 Q. Have you held any positions of responsibility in any
5 of those organizations?

6 A. Yes. I've been chairperson for different task groups
7 that write safety standards about footwear, with respect to
8 the structure and safety of footwear, walkway surface
9 safety, slip resistance measurement, workplace safety.
10 Those are committees and standards that I've been involved
11 in actually writing.

12 Q. And did you hold any positions in particular that you
13 can tell the jury about?

14 A. I'm just chairperson of the groups that wrote the
15 standards. I have several standards that -- the words in
16 the standards are my words.

17 Q. Do you have any board certifications or any similar
18 registrations during your career?

19 A. I have been a professional engineer, a certified
20 safety professional, and a certified tribometrist.

21 Q. What does it mean to be a professional engineer?

22 A. You have to complete a minimum four-year accredited
23 engineering program, take a comprehensive examination to
24 qualify as an engineer in training, work for a minimum of
25 four years in responsible charge of engineering projects,

1 and then take another board examination.

2 Q. Where have you been board certified as a professional
3 engineer?

4 A. New York, New Jersey, Pennsylvania, South Carolina,
5 and Delaware.

6 Q. What does it mean to be a certified safety
7 professional?

8 A. Basically the same program. You need a minimum
9 four-year accredited college program, you take a
10 comprehensive board examination, you must work a minimum of
11 four years in responsible safety science applications, and
12 then take another board examination.

13 Q. Where have you been board certified as a certified
14 safety professional?

15 A. The Board of Certified Safety Professionals is not
16 limited to states, it is international, so my certification
17 is international.

18 Q. Now, you mentioned ASTM standards and the writing that
19 you did, but other than that, have you been involved in any
20 other similar work?

21 A. Yes. The United States Department of Labor
22 Occupational Safety and Health Administration, OSHA, hired
23 me to participate in making new laws, and I testified in
24 Washington, reviewing interested or concerned parties'
25 position papers and scientific research, and those laws were

1 related to workplace safety, specifically related to safety
2 in the steel erection industry, and it had a principal focus
3 of slip resistance on steel surfaces in the workplace.

4 Q. Is it part of your work to testify in court, like
5 today?

6 A. Yes, about one out of 10 cases that I analyze and
7 write reports on ends up in court.

8 Q. Have you been qualified by courts as an expert in
9 professional engineering, workplace safety and the sciences
10 you have listed in any of those prior appearances?

11 A. Yes.

12 MR. ROSENTHAL: At this time, Your Honor, we offer
13 Mr. George Widas as an expert in the field of engineering
14 and safety, specifically in the fields of workplace safety
15 and human factors.

16 MR. MINO: No objection.

17 THE COURT: He's so qualified.

18 You can proceed.

19 MR. ROSENTHAL: Thank you, Your Honor.

20 Just for the record, can I approach the witness?

21 THE COURT: Yes, you may. Tell me what you're
22 showing him.

23 MR. ROSENTHAL: It's his CV.

24 MR. MINO: Yes.

25 THE COURT: Okay.

1 Q. I'm going to ask you to take a look at this document,
2 Plaintiff's Exhibit 6.

3 Do you recognize that?

4 A. Yes.

5 Q. What is it?

6 A. It's a year-old curriculum vitae and fee schedule.

7 Q. Do you have -- are there additions that are not on
8 there?

9 A. The only thing that's not on there was a Federal
10 Railroad Administration training and qualification as a
11 contract roadway worker on track protection program that I
12 took and was certified by the Railroad.

13 Q. What was your assignment in this case?

14 A. To figure out what happened and why, using forensic
15 engineering techniques and the sciences that we've talked
16 about.

17 Q. How did you go about performing your engineering in
18 this case?

19 A. I was given factual sources of information by
20 Mr. Rosenthal or his office. I did independent
21 data-gathering by examining the railroad car and the
22 location of the event, and other independent data-gathering
23 by putting together regulations, codes, standards,
24 authoritative reference books, textbooks, peer-reviewed
25 published papers and other documents, and then I analyzed

1 and reviewed those documents and rendered a report.

2 Q. Now, what materials did you receive from my office?

3 A. I received different legal proceedings documents, I
4 grouped them all together, complaints and other things that
5 don't provide facts to me, so I don't use them or rely upon
6 them. But factual sources of information included the PATH
7 reports and investigations documents that were related to
8 the injury event to Mr. Foder, as well as answers to
9 interrogatories and answers to notices to produce answered
10 by Steven Foder and answered by PATH, and I reviewed
11 transcripts of depositions of Mr. Foder, Sandra Bou, Gregory
12 Reich, Dennis Velez, Astagne Avril, and Ken Wallace. I also
13 was provided recently with a report of Augustine Ubaldi,
14 dated February 24, 2016.

15 Q. What independent gathering did you perform?

16 Independent data gathering.

17 A. Okay. I put together the weather data for -- to
18 establish the environmental conditions at the time and place
19 of the event, and I put together references, standards,
20 codes, regulations, and authoritative papers that are
21 related to safety in general, human factors, and
22 specifically related to climb systems.

23 Q. Before we go any further, I would like to instruct you
24 that all of your answers from here on out be opinions, and
25 can you give the basis of those opinions.

1 A. Yes.

2 MR. MINO: Objection. To instruct him that they
3 have to be opinions?

4 THE COURT: I'm not going to -- that's a strange
5 question. You can ask the question, what is your opinion to
6 a degree of scientific certainty, but --

7 MR. ROSENTHAL: I understand.

8 THE COURT: -- but you have to ask him a fact
9 question. It's not his opinion.

10 MR. ROSENTHAL: Inartfully asked. Thank you, Your
11 Honor.

12 THE COURT: All right. Good. We're on track
13 again.

14 BY MR. ROSENTHAL:

15 Q. Now, I do want to ask that your answers be to a
16 reasonable degree of engineering probability unless you
17 indicate to us otherwise. Okay?

18 A. Yes.

19 Q. Now, what significant facts and information did you
20 extract from the materials that you reviewed about the
21 details of the event in which Mr. Foder was injured?

22 A. Most of it -- I've been here the last two days, so
23 most of it you've already heard a lot of. The event
24 occurred on July 22, 2011 in the Journal Square Station on
25 track S. It occurred at about 4:30 p.m., involving car --

1 PATH railroad car number 5678; that at the time of the
2 event, Engineer Foder was going to his work assignment. He
3 left the control location, the dispatcher location, walked
4 through the station, went down to track level, approached
5 the railroad car and climbed onto the car as he's described
6 for you many times.

7 The -- beyond that, you've heard it all, and I
8 don't need to repeat it.

9 Q. Okay, and where did the injury event take place?

10 A. In Journal Square Station, track S, which is the
11 bottom level of the station.

12 Q. Now, based on the information you reviewed and the
13 materials you described and your examination of the
14 location, was there anything significant about the walking
15 environment for railroad workers approaching the location
16 where Steven Foder climbed up the railroad car?

17 A. Yes. My examination in October of 2015, more than
18 four years after the event, when I was there, it was a
19 greasy, grimy, trash-strewn area at that location. That was
20 more than four years after the event.

21 You've also heard what you've heard about the
22 condition of the location at the time of the event, which
23 was consistent with what I observed when I was there.

24 I also heard testimony here in the courtroom over
25 the last two days about the automatic greaser that is in the

1 location of this area, which would provide a probable source
2 of contamination with grease on a regular basis.

3 That's what my factual review told me about the
4 location.

5 Q. Now, you said you did an inspection of the railroad
6 car and location --

7 A. Yes.

8 Q. -- of the injury event?

9 A. Yes.

10 Q. Can you describe the location for us?

11 A. I took photographs. If we could look at a photograph,
12 you could see.

13 Q. Sure.

14 I'm going to show you 55 photographs that have
15 been marked as Exhibit -- as part of Exhibit 5 -- they're a
16 part of Exhibit 5, Your Honor -- and ask you to identify
17 them. And please keep them in two different piles if you
18 can.

19 THE COURT: Okay. Are these the exhibits attached
20 to the expert report?

21 MR. ROSENTHAL: Yes.

22 A. These appear to be the photographs I took on October
23 6, 2015.

24 Q. Okay. And you took of the railroad car and the
25 location?

1 A. What's that?

2 Q. You took of the railroad car at issue and the
3 location?

4 A. This pile is location, and this pile -- I see my hand.
5 This pile would be my examination of those -- railroad car.

6 Q. Okay.

7 MR. ROSENTHAL: And we would like to offer those
8 photographs as Exhibit 5, Your Honor.

9 THE COURT: Which ones?

10 MR. MINO: PATH objects to the introduction of
11 some of them.

12 MR. ROSENTHAL: Yes, there's -- can we see --

13 THE COURT: Sure. Bring the pictures.

14 (The following takes place at sidebar)

15 THE COURT: There are a ton of pictures here.

16 Which one?

17 First of all, in the future, something that you're
18 going -- you have big books of exhibits. This is I think
19 the first ones you're entering into evidence. These
20 pictures are important. In the future, have them premarked
21 individually. What's the point of having all these big
22 books and showing them to the witnesses and the key exhibits
23 you have lumped in as Plaintiff's Exhibit 5 and they're not
24 premarked. The purpose of premarking is so we don't have to
25 do this in the middle after trial.

1 Just a little best practices tip. This is not the
2 way to do it.

3 So you probably have 20 pictures attached to his
4 expert report.

5 MR. ROSENTHAL: There is 55 pictures.

6 THE COURT: Fifty-five. They each should be
7 marked separately. We have three books. Have you entered
8 anything into evidence yet?

9 MR. DiGIULIO: A few things, I think two or three.

10 THE COURT: It's ridiculous.

11 Go ahead. Have you showed these to your
12 adversary?

13 MR. DiGIULIO: Yes.

14 MR. MINO: Yes.

15 MR. ROSENTHAL: And we made two piles, one of
16 which there's no objection to, one of which he has
17 objections to. That's why I split them up.

18 THE COURT: Okay. So we have to premark them.
19 This is 5, it will be P-5-1 and go all the way through, so
20 we have a record for the Court's official report.

21 MR. MINO: And just so we're clear, the ones that
22 are being objected to are ones that depict the grip tape on
23 the train, the subsequent remedial repair issue.

24 MR. ROSENTHAL: We're keeping them out.

25 THE COURT: Okay. So you're going to have to take

1 a minute with Amy and you're going to have to mark them.
2 You're going to have to go through them one by one. In
3 other words, we need to have each one of those marked.
4 Okay. So you have to give them to Amy, and I don't know
5 which ones they are.

6 This should have been done at the break and should
7 have been raised with me while the jury was not here.

8 She's going to mark the Court's official
9 documents. We have no way of knowing which ones, right,
10 because they've all shoved in here together, right, all 55
11 of them?

12 MR. MINO: Yes, kind of. I mean, yes, it's going
13 to be difficult.

14 THE COURT: Okay. It's going to be difficult. In
15 the future, you have to have every single document
16 premarked.

17 Let's go back, and we'll wait for Amy to do it.
18 It's going to take a few minutes.

19 (The following takes place in open court)

20 THE COURT: The jury will just have to bear with
21 us for a few minutes as we mark some documents. Okay?

22 Just for the record, I'm just reviewing exhibits.
23 There is only one other exhibit in evidence, P-24A, a
24 picture.

25 MR. ROSENTHAL: Right, 24A.

1 THE COURT: 24A. That's it.

2 MR. ROSENTHAL: Right. And actually, Your Honor,
3 23A --

4 THE COURT: Was that moved in yet? I don't think
5 so.

6 MR. MINO: No.

7 MR. ROSENTHAL: No, but it's going to be moved.
8 We can move it in right now.

9 THE COURT: Is there any objection to 23A going
10 in?

11 MR. MINO: No, there's no objection to that.

12 THE COURT: Okay. 23A is in evidence.

13 (Plaintiff's Exhibit 23A marked in evidence)

14 (Plaintiff's Exhibits 5A through 5UU marked for
15 identification

16 THE COURT: Amy, can you start with some of them?

17 THE COURT CLERK: Sure.

18 BY MR. ROSENTHAL:

19 Q. Mr. Widas, I'm going to show you some of these
20 photographs.

21 These are the photographs that you took?

22 A. Yes.

23 MR. ROSENTHAL: Your Honor, I'd like to move for
24 the admission of the photographs listed as 5A through 5TT.

25 THE COURT: Any objection?

1 MR. MINO: The other ones are taken out?

2 MR. ROSENTHAL: Yes, they're all taken out.

3 MR. MINO: So no objection to what's been marked.

4 (Plaintiff's Exhibits 5A through 5UU marked in
5 evidence)

6 THE COURT: Okay. You can proceed.

7 Q. Okay. Mr. Widas, what did you do when you examined
8 the railroad car and location?

9 A. I took photographs and made observations and took
10 measurements.

11 Q. Okay. And based on your review of the materials and
12 the testimony and your inspection of the railroad car, what
13 did you determine about any physical characteristics of the
14 railroad car that were related to what happened to Steven
15 Foder?

16 A. The best way to answer that would be to demonstrate
17 the relative dimensions and locations of the component of
18 the climb system, and I could do that if I could just point
19 to this witness box from that side with my tape measure.

20 MR. ROSENTHAL: Your Honor?

21 THE COURT: Any objection?

22 MR. MINO: I would assume that there would be a
23 foundation laid giving the relative height of the witness
24 stand and all of that.

25 THE COURT: Yes. Will he explain what he's doing?

1 MR. ROSENTHAL: Sure.

2 Q. Why don't you do that, and explain to the jury exactly
3 what you're doing?

4 THE COURT: Yes, you may.

5 THE WITNESS: Thank you.

6 (The witness stepped down.)

7 A. If we were to use this structure (indicating the
8 witness stand) to represent the back of the railroad car, I
9 took a measurement of the railroad car itself and measured
10 from the ballast or track surface -- not the rail itself,
11 but the bottom where Mr. Foder was standing, and from there
12 to the deck of the railroad car was 49 inches -- 49 and
13 three-quarters inches.

14 This is 47 inches. So if we were to take one of
15 these cups and add two and three-quarters inches to it, to
16 this line, we would have the height to the deck of the
17 railroad car (drawing a line on a paper cup) from the floor
18 of the courtroom to that line on that cup.

19 If I could use that photograph, too, if that could
20 be --

21 MR. ROSENTHAL: Your Honor?

22 THE COURT: Sure.

23 THE WITNESS: Can I bring it over here?

24 THE COURT: Sure.

25 A. In the photograph 23A, from the right corner of the

1 car over to the doorway opening into the vestibule is 33 and
2 a half inches. I measured that. So if we were to measure
3 from this point, and we're going to call this the right
4 corner of the end of the railroad car, if we run over 33 and
5 a half inches, we put our cup there, that's where the
6 opening is into the doorway.

7 I measured from track level, the ballast, where
8 Mr. Foder was standing, to the step. It is 27 inches, 27
9 and a quarter inches. And if I were --

10 THE WITNESS: Could I put painter's tape on the --

11 THE COURT: Yes.

12 THE WITNESS: Just be careful. It's the
13 Government's property.

14 (Laughter)

15 THE WITNESS: Painter's tape leaves no damage.

16 A. So if I come up 27 and a quarter inches -- I see that
17 scratch - I didn't do that -- and I'm just going to...

18 Okay. The step starts five and a half inches in
19 from the edge of the car.

20 I'm going to get a better marker.

21 So if I come in -- first I go up 27 and a half --
22 27 and a quarter inches -- it's right there -- and I come in
23 five and a half from our corner and start my step right
24 there. And the step is 11 inches long, so I'm going to come
25 over 11 inches to this point right here, and that's our

1 step, right there. Okay.

2 Now, we have grabs. First we have an L-shaped
3 grab that starts four inches over from the opening of the
4 doorway. So if we were to come over four inches from the
5 doorway, we have a grab that is oriented at that location
6 along the back of the car.

7 Remember, this is our doorway opening. We go over
8 four inches, and we're going to go to this grab.

9 The bottom of that grab is eight and three quarter
10 inches above the deck of the railroad car, so eight and
11 three quarter, we're going to start that grab bar right
12 about there. We're going to imagine that.

13 Eight and three-quarters -- we have somewhat of a
14 reference. We're going to be right about there.

15 And that vertical piece goes up to 34 and a
16 quarter inches above the deck, so if we start at the deck
17 and go up 34 and a quarter inches, that's the bottom of that
18 rail, that grab rail, the bottom -- I'm sorry -- I've got to
19 do this -- up eight and three quarters to the bottom of that
20 vertical part of the grab rail. The horizontal part of the
21 grab rail is 34 -- 35 and a quarter inches above the deck,
22 so the rail goes from here to the top of my tape measure
23 right now, and then from there, we go across 12 inches --
24 hang on -- the horizontal portion is 12 inches.

25 So that's, if you can imagine, we have a bar right

1 there. That's the rail that Mr. Foder grabbed. If we can
2 imagine seeing that, so this is the step, that's the bar,
3 and he's -- he describes he had his right foot on the step
4 and he's going to put his left foot up here, this is the
5 doorway opening, the dimensions that I measured along the
6 top of the deck of the rear -- of the end of the railroad
7 car, it starts three inches wide over here above the step
8 right here, it's three inches wide. By the time we get to
9 the door, it's seven inches, of which the front edge is one
10 and a half inches of smooth steel.

11 Could we have that photograph up?

12 (Plaintiff's Exhibit 24A was displayed.)

13 A. You've seen the photograph a million times.

14 So we have the inch and a half of smooth steel all
15 across a rounded edge. The rounded edge permits the
16 railroad cars to go around curves. And then we have diamond
17 plate inside of the one and a half inch wide smooth steel
18 rib of the anti-climber.

19 There are three ribs on the anti-climber, and
20 we're talking about the top of the three ribs.

21 The height of the anti-climber face is seven and a
22 half inches, in other words, from here to here, seven and a
23 half inches. This -- from the step to the bottom of the
24 anti-climber is 15 inches, so I could draw, you know, 15
25 inches up. That's the -- that's where our step is, right

1 here, that U would be our step.

2 And our grab rail is up there that Mr. Foder
3 grabbed.

4 Q. And there's the exhibit.

5 A. You can see the curved inch and a half smooth steel
6 edge of the anti-climber.

7 Q. Which is Exhibit 24A.

8 A. You can also see the diamond plate that's there. The
9 generic name for it is called raised lug metal decking, and
10 we can talk more about that later. But those are the two
11 materials that are on the deck that extends into the
12 vestibule of the end of the car.

13 Q. And they were the available -- that was the available
14 climb system?

15 A. There is another grab, this one. I just want to show
16 you where that is relative to what we're talking about. The
17 bottom is 48 inches above this, above the deck, so it starts
18 there, okay, and then goes up 17 inches, all right?

19 So imagine that we have a grab above the end of
20 the ruler, up 17 inches, and we have another grab that's
21 over here that we saw before that's about there.

22 All right. Those are the critical dimensions of
23 the railroad car that I measured when I examined the
24 railroad car.

25 Q. Were any climbing aids provided beyond the fixtures

1 that were part of the railroad car?

2 THE COURT: Let me stop you.

3 Are you finished with the demonstration. Should
4 the witness go back to his --

5 Q. Are you finished with the demonstration, or are you
6 going to go back to the photograph?

7 A. I think I'm done.

8 THE COURT: Okay. Good.

9 (The witness resumed the stand.)

10 MR. ROSENTHAL: And for the record, Your Honor, it
11 goes up to 5UU.

12 THE COURT: Okay. So it's P-5 --

13 MR. ROSENTHAL: P-5A through P-5UU.

14 MR. MINO: Could you move that photograph, please?
15 Thank you.

16 THE COURT: Okay.

17 BY MR. ROSENTHAL:

18 Q. So were there any -- and, Mr. Widas, if you -- you
19 took the photographs, and they're in front of you. If you
20 need to reference any of them, please do, but please tell us
21 what photograph that you're referencing by exhibit number,
22 and then we'll pass it around so that everybody can see what
23 it is.

24 A. Okay. When you took these from me originally, we were
25 talking about the condition of the track area where the

1 event occurred, and that would be 5A, B, C and D.

2 THE COURT: There's no question pending.

3 THE WITNESS: Oh.

4 THE COURT: So the way it works here is, he asks a
5 question, you answer it. There's no question pending. So
6 let Mr. Rosenthal ask the question.

7 Q. Were any climbing aids provided beyond the fixtures
8 that were part of the railroad car?

9 A. No.

10 Q. What role did your review of the reference materials
11 play in the analysis you performed and conclusions that you
12 reached in this case?

13 A. There are many regulations, codes, and standards and
14 published articles and sections of textbooks that relate to
15 climb systems. They establish the human factors aspects of
16 the use of climb systems and the desirable features of climb
17 systems. There's also textbooks about the physics that
18 would be experienced during -- using a climb system. So I
19 list those materials in my report to establish criteria for
20 a safe climb system.

21 Q. Can you tell the jury just what you mean when you say
22 climb system?

23 A. To get from one level to another. It could be a
24 ladder, it could be a stairway. I mean, it could be a
25 portable ladder, a fixed industrial ladder, a stairway, or

1 the climbing system that we're looking at here. Any time
2 that you want to get workers from one level to another
3 level, there are standards that apply to that.

4 Q. Now, are the references that you referred to generally
5 recognized and accepted as authoritative by professionals --

6 THE COURT: I'm going to stop you.

7 You need to ask him the specific things he relied
8 on, not just what's in the report. The jury is not getting
9 his report. So he has to recite what you relied on, and
10 then you can ask him a follow-up question. You can't just
11 ask him, is everything in your report reliable.

12 BY MR. ROSENTHAL:

13 Q. What did you rely upon?

14 A. I started out with the regulations that govern climb
15 systems in the railroad world, and that included the
16 United States Department of Transportation, Federal Railroad
17 Administration, C.F.R. 49, volume 4, section 231.13 and .14.

18 I used the criteria that is recommended for safe
19 railroad environments of the American Public Transportation
20 Association.

21 I used the criteria for safe climb systems from
22 OSHA.

23 I used the criteria for safe climb systems from
24 the Society of Automotive Engineers, who tell us how to make
25 safe climb systems for heavy trucks or offroad equipment

1 like bulldozers or cranes or other things like that that
2 people climb into, the operator climbs into.

3 I used all of those to establish the basic
4 criteria. They all agree that as a person climbs that the
5 forces and loading on the person and the climb system should
6 be symmetrical and concentric, and we can define what that
7 means in a minute. Or should we do it now?

8 Q. Why don't you do it now?

9 A. Okay.

10 THE WITNESS: Can I have a stick? May I use my
11 stick?

12 THE COURT: Sure.

13 THE WITNESS: Okay.

14 A. This is actually another question, but we'll do it
15 now.

16 Force analysis. Physics and vector analysis
17 analyze forces.

18 When we climb a system, we want all the forces to
19 be straight up and down, because, as soon -- what happens in
20 vector analysis is a resultant vector, or a force. If I
21 push with this on you, I'm exerting a vector on you.

22 Right now, this vector is 90 degrees to the
23 support surface, and no matter how hard I push, it does not
24 move with respect to this surface.

25 As soon as I introduce eccentricity of the force,

1 meaning moving it away from the center, making it
2 asymmetrical and eccentric and I push down, I have produced
3 a horizontal component of this vector. Instead of just
4 being straight down against the surface, as soon as I
5 introduce an offset and push down, I now have a force that
6 I'm pushing down with, and as I push down with that force,
7 it exerts a component along the surface which requires
8 resistance to that motion if we don't want it to move.

9 So the criteria of the climb systems wants us to
10 keep everything centered and concentric. As soon as you
11 start to get away from the center, when you push down or try
12 to climb, you're going to introduce lateral forces that
13 require resistance in the system.

14 Q. Now, did you review -- did you use any other
15 references in coming to your conclusions in this case?

16 A. Physics, biomechanics, anthropometric data in the
17 human factors authorities and textbooks. Anthropometric
18 data tells us what the shoe size is of a person, what the
19 width of footwear is, what the length of footwear is. Body
20 mass index, stature, dimensions of arms, legs, shoulders,
21 hips, all of those things, that's anthropometric data.
22 That's all in there, too.

23 Q. Now, how did you get and find your references?

24 A. They are generally available at a library or online.
25 If you're interested in the subject, you could just look up

1 the subject of safe climb systems, human factors, forces,
2 friction, and other things, and it's readily available.

3 Q. Now, can you please explain -- and you might have
4 already begun this, but please explain specifically how you
5 applied the science of physics to reconstruct the event in
6 which Mr. Foder was injured.

7 A. Well, first, we use the science of vector analysis or
8 force analysis, which is physics, and we just demonstrated
9 that if you get eccentric or asymmetrical with your system,
10 meaning take a step over there, and you got to land over
11 here and you put a railing to grab up here, as soon as that
12 person steps on that step and reaches for that rail that far
13 up, if they can reach it, otherwise they're just going to
14 try to use the deck, but as soon as they start to reach up,
15 then we go asymmetrical and eccentric, and we start
16 requiring horizontal -- we produce horizontal forces, which
17 is traction demand, which means we have to have available
18 traction to resist that horizontal force.

19 To compound that, in this case, by then having to
20 move that foot up over four feet -- I'm sorry, the trailing
21 foot, lift it more than four feet from that level up to this
22 level and land on something that's -- the first inch and a
23 half is smooth steel, and then we have some raised-lug metal
24 diamond plate. So again, we're eccentric, because the grab
25 -- here's -- our grab goes from here over to here up there,

1 which is eccentric and asymmetrical with respect to our
2 landing point.

3 So our takeoff and our landing and our grab are
4 all not symmetrical, they're all eccentric and asymmetrical.

5 The simplest example that demonstrates it is a
6 ladder, a conventional ladder. When you climb a ladder, you
7 put your foot down, straight down, and without having to
8 deviate from putting any weight straight down, you have
9 grabs readily available on both sides, and all of the
10 standards, the C.F.R.'s, the SAE's, the ASTM's, the ANSI's,
11 all the standards, they all say that the grabs must be
12 aligned so that forces are straight up and down on the
13 steps.

14 Q. Are the standards that you just referenced, are they
15 recognized and accepted as authoritative by professionals in
16 the fields of engineering, human factors, and workplace
17 safety?

18 A. Yes.

19 Q. Now, how does the science of physics explain friction?

20 A. Okay. Friction comes from adhesion, and the most
21 predominant form of adhesion that creates friction is
22 mechanical adhesion. The best example of that is, if you
23 could picture in your mind microscopically a hairbrush that
24 is the floor that sticks up with bristles, and the bottom of
25 your footwear also has bristles, and when you exert weight

1 on the two surfaces, they engage each other and they won't
2 slide with respect to each other because they have
3 mechanically interlocked.

4 Slip-resistant materials, if you notice, have
5 things that stick up. They're called asperities. The
6 sharper the asperities, the more you get mechanical adhesion
7 and you create friction. If it's a smooth surface, you
8 don't get mechanical interlocking of the footwear bottom and
9 the walkway surface. So we're always looking for two
10 brushes with bristles pointing at each other. You want a
11 walkway with sharp things sticking up -- now, caught by
12 grit, which is like sand size, works perfectly, okay? You
13 don't need to have bristles. But on that microscopic level,
14 it's bristles and bristles. That's mechanical interaction.
15 If you have smooth, you don't get the mechanical
16 interaction, you don't have friction. Smooth, hard surfaces
17 are slippery, and they're particularly slippery when they're
18 contaminated.

19 Q. Now, when you examined the subject railroad car, did
20 you measure the friction?

21 A. I did not.

22 Q. Can you explain why you didn't?

23 A. The conditions were different.

24 MR. MINO: Objection.

25 Q. Okay. Just the conditions were different.

1 A. The conditions were different. I was there more than
2 four years later, and the conditions were different.

3 THE COURT: Okay.

4 Q. Now, have you measured smooth steel surfaces before?

5 A. Hundreds of times.

6 Q. And how have you done that?

7 A. With a tribometer. I mentioned before that I'm a
8 certified tribometrist, and I also write safety --
9 scientific standards for the calibration and validation of
10 walkway tribometers, which are slip-resistance-measuring
11 devices. I measured slip resistance of walkway surfaces and
12 walkway surface materials thousands of times over the last
13 more than 30 years. I use a tribometer that is validated,
14 calibrated, and certified as accurate, repeatable, and there
15 are peer-reviewed papers that validate its accuracy and its
16 meaning with respect to the risk for human slip-and-fall
17 injury events.

18 So I've measured smooth, hard surfaces thousands
19 of times, I've measured smooth, hard metal hundreds of
20 times, and no, the value, for instance, of --

21 MR. MINO: Objection. If he's going to testify to
22 some general standard for smooth, hard metal that he may
23 have measured but isn't in his report, PATH objects to that.
24 There is no listing of previous time that he's measured any
25 smooth, hard metal in his report.

1 THE COURT: Mr. Rosenthal, he's limited to the
2 four corners of his report.

3 This is all new testimony.

4 MR. ROSENTHAL: Okay.

5 THE COURT: Why don't you move to another topic?

6 BY MR. ROSENTHAL:

7 Q. Now, there's been a lot of mention in this trial by
8 PATH about the diamond plate on the deck of the vestibule.

9 A. Yes.

10 Q. Now, that extends out to the edge of the anti-climber,
11 is slip-resistant because of its projections?

12 A. I've heard that.

13 Q. And have you measured the slip resistance of the metal
14 diamond plate?

15 A. I have.

16 Q. And how much friction is available from that diamond
17 plate?

18 MR. MINO: Objection. He did not measure the slip
19 resistance of this diamond plate. It's not in his report.

20 THE COURT: Let's look at the report.

21 I don't see any discussion of friction on the
22 diamond plate anywhere in his report.

23 MR. ROSENTHAL: No, but there was testimony about
24 that.

25 THE COURT: Testimony where?

1 MR. ROSENTHAL: From Mr. Avril.

2 THE COURT: That doesn't mean he can testify about
3 it if it's not in his expert report.

4 MR. ROSENTHAL: Well, he can testify --

5 THE COURT: About what? He can testify to the
6 four corners of his report.

7 I read this report earlier. This is all new,
8 about the friction resistance of the diamond plate. It's
9 not in here.

10 Show me where it's in here and I'll give you some
11 latitude. But I'm going to hold him to his report. His
12 conclusions are short.

13 MR. ROSENTHAL: Okay.

14 THE COURT: Nothing about friction resistance that
15 I can see, unless I'm missing something. If you want to
16 point it out to me.

17 His conclusions are on pages 33 to 36, 37.

18 MR. ROSENTHAL: No, he was just going to respond
19 to some of the testimony.

20 THE COURT: He can't respond.

21 It's your case. You called the witnesses. He's
22 your witness. He's limited to this report. He's not a
23 rebuttal witness. We're still on the Plaintiff's case. So
24 this is -- query whether I will allow a rebuttal expert
25 under the circumstances, but the other gentleman was a fact

1 witness.

2 I'm going to hold every expert in this case to the
3 conclusions in their report.

4 MR. ROSENTHAL: Okay.

5 BY MR. ROSENTHAL:

6 Q. Other than the scientific references we discussed, how
7 did you utilize the regulations and safety standards you
8 reviewed in your analysis of this event?

9 A. I used the regulations, codes, standards, textbooks,
10 and peer-reviewed articles to give criteria and to define
11 what's accepted safe practice; in other words, how to safely
12 engineer the system according to the principles of safety
13 and the science of safety that we discussed before, the
14 four-step process.

15 I'm not an FRA, Federal Railroad Administration
16 enforcement officer. I don't write citations on railroad
17 cars. I'm a safety professional. So I just used those
18 references to establish what's safe and what's not safe.

19 Q. And what does accepted safe practice mean?

20 A. That when you follow the scientific method for
21 determining safety, in other words, safety engineering
22 science, you reduce the risk of harm to a reasonable level.
23 You define a potential hazard, you rate the hazards, and
24 those that are severe you want to do something about, and
25 then you do something about it.

1 Q. Now, what in those regulations and authoritative
2 references was related to your analysis in this case?

3 A. As we've discussed, that as you -- when you create a
4 climb system, you want the forces exerted during use of the
5 climb system to be concentric and symmetrical, so the
6 components have to be lined up that when you're gripping to
7 lift and step up when your foot is on this step that there
8 should be a grab here, and then as you step over to here,
9 there should be a grab here so that you can always have
10 straight up and down alignments of the exertion of force as
11 you use a climb system. You don't reach from one point at
12 an angle over to another. As soon as you do that and you
13 exert that force -- you have a force already on the step.
14 Now you're going to increase that force because it's shared
15 with the foot on the ground. As soon as you lift the foot
16 off the ground and reach for a grab that's asymmetrical and
17 offset across your body, which even induces a twist, which
18 complicates things even further, you've introduced the need
19 for more slip resistance. And then as you try to put that
20 foot down over here, hanging on here, you again have an
21 angle. You're not symmetrical or concentric.

22 Q. Now, what regulations or standards did you review that
23 were related to establishing accepted safe practices in this
24 case?

25 A. The ones we listed. We already listed those.

1 Q. Okay. Were any of the regulations directly
2 enforceable to the climb system on the end of the subject
3 railroad car?

4 A. There were -- the way PATH -- or the designer or
5 manufacturer of the car -- in the PATH system, they don't
6 use conventional climb systems on the side of the car. They
7 put it on the end of the car. None of the regulations apply
8 to -- none of the Federal regulations in a regulatory sense
9 address that issue. There are sill stirrups -- there are
10 stirrup -- stirrup sill steps and door entry steps, but they
11 are not associated with climbing in and out of the railroad
12 car. They are the standards that are the closest to
13 defining what we have here, but they're not directly
14 applicable.

15 Q. Now, comparing it with the recommended dimensions in
16 the safety references you've detailed for climb systems, how
17 do the grab bars, handholds on the railroad card available
18 to Mr. Foder compare to accepted safe practices?

19 A. They do not conform. They are offset, they are
20 eccentric, and they are asymmetrical. In other words,
21 there's not pairs for you to hold onto as you go.

22 Q. What is the significance of the locations of the
23 handholds with respect to physics, biomechanics and
24 ergonomics?

25 A. You saw how high that grab was that we're talking

1 about. That's -- the bigger the lever arm, the more the
2 force, that all of the dimensions make this system
3 foreseeably dangerous and foreseeably generating slips.

4 Q. What does excessively offset and asymmetrical mean?

5 MR. MINO: Objection. He does not define
6 excessively offset and asymmetrical in his report.

7 THE COURT: He's already testified about it. He's
8 testified to it all morning, so I'm going to let him answer
9 it.

10 MR. ROSENTHAL: I'll withdraw it.

11 Q. What is the significance of the fact that the
12 handholds are offset and asymmetrical?

13 A. The more they're offset, the more the forces are
14 generated. They're not supposed to be offset at all
15 according to those criteria that are in the references that
16 we cited. There is always symmetrical, concentric support
17 as you climb a step in the references and standards and
18 regulations. So any asymmetrical or eccentric components of
19 a system that make you reach and push to the side as you're
20 lifting up, any of that is excessive. It should always
21 allow you to exert your weight straight up and down.

22 Q. What about the landing surface? How far was that from
23 the stirrup step?

24 A. We got about -- about two feet. The inside of the
25 door is about two feet.

1 Q. Comparing the distance from the stirrup step to the
2 car deck with the recommended dimensions in the safety
3 references you've detailed for climb systems, how does that
4 condition on the railroad car available to Steven Foder
5 compare to accepted safety practices?

6 A. You have to step up more than two feet to the first
7 step and more than two feet to the next step. Ladder rungs
8 are supposed to be displaced 12 inches on center for regular
9 use in industrial climb systems.

10 Q. Does the horizontal distance from the stirrup step to
11 the car deck have any implications with respect to the
12 landing surface?

13 A. The more angle and height -- first of all, you can't
14 land your foot straight on the deck if you're hitting your
15 foot up that high. If you use biomechanics -- I don't need
16 to explain that. It's obvious.

17 And that means that you need to have a lot of
18 traction where that foot is landing.

19 Q. Okay. Now, comparing the smooth steel landing surface
20 with known -- with other similar steel, how does the
21 condition of the railroad car available to Steven Foder
22 compare to accepted safe practices?

23 A. We need improved slip resistance or more traction than
24 smooth steel offers us on the edge that you're going to
25 contact when you're contorting to lift up over four feet

1 from one level to another level.

2 Q. Does the climb system on the end of the railroad car
3 require anything that was not there at the time of the
4 injury event to make it safe for railroad workers to use as
5 a means to climb into the railroad car?

6 A. Improved slip resistance on the smooth metal,
7 symmetrical grabs so that you always have a support straight
8 up above where you're pushing off or landing with your feet,
9 and -- that was it. Because you said without a climb aid,
10 right?

11 Q. Yes.

12 A. Okay. That's it.

13 THE COURT: Mr. Rosenthal, how much more time do
14 you have?

15 MR. DiGIULIO: Probably about 10 or 15 minutes.

16 THE COURT: Maybe this is a good time to take a
17 break. It's already 1:30. I want to give them a half hour
18 lunch break, and we'll resume at two o'clock.

19 Ladies and gentlemen, we're going to try to finish
20 up this witness, and then there's a videotaped witness
21 that's a little over an hour. I'd like to see if we can get
22 that all in today to get you out by Friday. So we'll see
23 how far we can go with the video.

24 But it's 1:25 now. Let's take a break until about
25 two, and then we'll resume and finish up with this witness.

1 **Okay?**

2 **THE COURT CLERK: All rise.**

3 **(The jury exits)**

4 **THE COURT: Okay, guys. Enjoy your lunch. I'll**
5 **see you in a half hour.**

6 **Yes.**

7 **MR. MINO: Just quickly, my witness is here. Do**
8 **you want me to send her home?**

9 **THE COURT: No.**

10 **Thank you.**

11 **(Luncheon recess taken)**

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1 A F T E R N O O N S E S S I O N

2 (Jury out)

3 THE COURT CLERK: All rise.

4 MR. MINO: Your Honor, before we bring the jury
5 in: Would it be possible to go a little bit later today?
6 My witness has just informed me now that she is unavailable
7 tomorrow because she is on vacation.

8 THE COURT: Well, she's going to be under the
9 power that she's been ordered by this Court to be here
10 tomorrow.

11 MR. MINO: Okay.

12 THE COURT: So unless you tell me there's some
13 kind of -- we can take her out of order, maybe.

14 MR. MINO: I suggested that and counsel --

15 MR. ROSENTHAL: We have a videographer who cannot
16 make it any time other than now.

17 THE COURT: Okay.

18 So why don't you ask the jury before we can bring
19 them out, could they stay a little later today to get rid of
20 two witnesses.

21 The video is going to take how long?

22 (Off the record discussion)

23 MR. ROSENTHAL: Probably an hour and a half.

24 THE COURT: Okay, and how much longer do you have
25 with your expert?

1 MR. ROSENTHAL: I have about 10 or 15 minutes.

2 THE COURT: And cross?

3 MR. MINO: Half hour to 45.

4 THE COURT: So that will about put us at three.

5 Four. If we can go to --

6 (Off the record discussion)

7 THE COURT: If they'll stay to six, we should be
8 able to get everything done.

9 MR. MINO: And I apologize to everyone for the
10 trouble.

11 (The witness resumed the stand.)

12 THE COURT: Have a seat.

13 Tomorrow, you have two witnesses?

14 MR. MINO: Yes, we will have my liability expert
15 and my doctor.

16 THE COURT: The doctor is another hour. Have you
17 looked at their tape?

18 MR. MINO: At their tape? Yes, I watched their
19 tape last night.

20 THE COURT: Have they looked at yours?

21 MR. MINO: We just discussed it, and --

22 MR. ROSENTHAL: Yes, there's only, I think, one
23 objection, and it covers a lot of stuff, and I told counsel
24 I'd be willing to just withdraw the objection.

25 THE COURT: Okay. So then how long is your tape?

1 An hour?

2 MR. MINO: Yeah, about an hour.

3 THE COURT: And how long will your liability
4 witness take, like the morning?

5 MR. MINO: Yes, might not even take the whole
6 morning.

7 THE COURT: Okay. So we have the jury charge too
8 that we're pulling together, and after we break tonight, the
9 lawyers will stay and start looking at this charge, because
10 I want to charge the jury before closing statements.

11 MR. MINO: Okay.

12 (Off the record discussion)

13 THE COURT: Five at the latest. So, I mean, I'm
14 not adjourning it. So you do it at your own risk. You knew
15 that the trial was coming. That means you may not be able
16 to call your witness, unless we can get it done quickly. Or
17 if she can come tomorrow. This trial was scheduled months
18 and months ago. And the expectation was she would be
19 testifying Thursday or Friday. So I'm not going to carry
20 this case until next week if she's on vacation. When is she
21 on vacation through?

22 MR. MINO: Thursday, Friday, Saturday, Sunday.

23 THE COURT: I'm not carrying it till Monday
24 because I promised this jury five days, and the Port
25 Authority had ample notice of the length of the trial, and

1 we picked the jury. All along, Plaintiff's counsel had said
2 I think my case will take two days, roughly two days to put
3 in. That's exactly what it is, and you should have expected
4 Thursday and Friday.

5 So you can talk to her, but I'm not going to carry
6 it. You can put her at the end of your case tomorrow or
7 Friday morning, but I'm not going to be -- it looks like
8 this case can get to the jury before the weekend, and that's
9 what I'd like to do. Okay?

10 MR. MINO: Understood.

11 THE COURT: We'll go as quickly as we can. We'll
12 take a very brief afternoon break.

13 Let's bring out the jury and get it rolling.

14 THE COURT CLERK: All rise.

15 (The jury enters)

16 THE COURT: Welcome back, everyone.

17 Okay. Let's proceed.

18 We're trying to get as many witnesses done as
19 possible today, and I understand you guys have to break at
20 five, so we'll take a short afternoon break, and we'll
21 hopefully get the case to you as quickly as possible.

22 Continue.

23 BY MR. ROSENTHAL:

24 Q. Mr. Widas, the last question I asked you was, you gave
25 an opinion. Can you -- it was about the -- I'm going to

1 read the question: Does the climb system on the end of the
2 railroad car require anything that was not there at the time
3 of this injury event to make it safe for railroad workers to
4 use as a means to climb into the railroad car?

5 A. Yes, it needed more slip resistance on the smooth
6 metal edge, and grabs that lined up with the steps.

7 Q. What is that opinion based on?

8 A. That's based on the sciences of physics that we talked
9 about and biomechanics, and the requirements in the FRA
10 regulations related to similar devices, and the regulations
11 in the Society of Automotive Engineers' articles that are
12 cited in my report, the OSHA climb requirements, and the
13 American National Standards Institute's or ASTM climb
14 requirements that are listed in my report, all of which say
15 that climb systems have to have three points of contact that
16 are centered and symmetrical with respect to where you step
17 and push to lift yourself up.

18 Q. Under the circumstances of the climb system in this
19 case, was the steel of the anti-climber safe?

20 A. No.

21 Q. Now, what does the climb system on the end of a
22 railroad car require that was not there to make it safe for
23 railroad workers to use as a means to climb into the
24 railroad car?

25 A. A grit-impregnated treatment on the smooth metal, and

1 grab bars that are lined up with the steps.

2 Q. From an engineering science point of view. What does
3 all of that have to do with what Steven Foder described
4 happened when he was hurt?

5 A. The way he describes the event is exactly what would
6 happen according to what physics will tell us would happen.
7 In other words, he has to reach over and step up over four
8 feet high while standing on a rung that's more than two feet
9 high and step laterally about two feet with a support in the
10 middle. So there's a lot of angles, and because of the
11 contortions and the height of the step up, he can't get his
12 foot all the way onto the deck, he's going to contact the
13 portion of the edge, which is the smooth metal. So he could
14 either use a climbing aid, like a stool or a ladder, to help
15 him, or he would need the improved slip resistance on the
16 edge, or grabs that line up with the steps.

17 Q. Are you criticizing the design of the railroad car?

18 A. No.

19 Q. Then what is your focus?

20 A. Using the railroad car the way that it was used, in
21 other words, you shouldn't have people going -- climbing in
22 and out of the cars without the slip resistance, without
23 addressing the safety issues or the dangerous parts of the
24 climb system that were there.

25 Q. Now, what significant facts and information did you

1 extract from the materials you reviewed in this case about
2 the workplace safety practices of PATH as related to the
3 injury event?

4 A. Okay. We talked about the principles of safety, the
5 science of safety, hazard analysis, risk assessment, hazard
6 mitigation. There was no indication in anything I reviewed
7 from PATH that they considered that method of achieving
8 safety. All they did from what I could tell was talk about
9 the rules and regulations of the Federal Railroad
10 Administration and the book of rules of PATH, without
11 looking at the system that was involved in injuring
12 somebody.

13 Q. Now, based on the sciences you have explained and
14 based on your application of the facts presented in this
15 case to those scientists, is it foreseeable that someone
16 could be injured in the manner that Mr. Foder was injured
17 when attempting to gain access to the railroad car at that
18 location and in the manner he described?

19 A. Yes.

20 Q. And based on the sciences you've explained and based
21 on your application of the facts presented in this case to
22 those sciences, did you formulate an opinion with regard to
23 how the actions of Steven Foder compared to accepted safe
24 practices as related to the happening of this injury event?

25 A. I did.

1 Q. And could you explain that opinion?

2 A. He was doing his job the way he understood it to be
3 done. He was not a safety inspector from the railroad who
4 was supposed to go out and evaluate the safety of climb
5 systems. It wasn't part of his job duty to assess the
6 safety of the railroad station as he approached the railroad
7 car. He's a locomotive engineer. It would be unreasonable
8 from a safety perspective to expect him to evaluate the
9 safety of the universe and protect himself in that way.
10 That's why -- that is the fourth level of safety, you know,
11 if you have a defined hazard or significant risk, get rid of
12 it, guard against it, warn about it, and then rely on the
13 user to protect himself. It wasn't his job to evaluate the
14 safety of the track, the grease, the automatic greaser that
15 was in the area of where the event occurred, and it wasn't
16 his job to evaluate the safety of the climb system. He just
17 used it the way that he was -- that it was his practice and
18 he understood to be the right way.

19 Q. Was there any evidence whatsoever that he did anything
20 wrong that day?

21 A. No.

22 Q. Now, based on the sciences you have explained and
23 based on your application of the facts presented in this
24 case to those sciences, what was the relevant accepted safe
25 practice or standard of care for PATH as far as workplace

1 safety is concerned relating to the happening of this injury
2 event?

3 A. That they should have properly evaluated the climb
4 system and identified the dangerous characteristics of the
5 climb system and mitigated the dangerous conditions of the
6 climb system, which means that because of its configuration
7 that you need more slip resistance where the foot lands
8 because of the eccentricity and asymmetrical aspects of the
9 forces and the location of the grabs with respect to the
10 steps.

11 Q. Now, based on your knowledge of the methodologies at
12 PATH when PATH investigated and addressed the safety aspect
13 of the subject injury event, did PATH follow accepted safety
14 procedures as defined in the sciences and principles you
15 have cited?

16 MR. MINO: Objection. If he could just lay some
17 foundation as to the understanding he has about what PATH
18 does. There was no basis or foundation laid for that.

19 MR. ROSENTHAL: Okay. I'll ask it.

20 THE COURT: Do you want to rephrase it? Want to
21 lay a foundation?

22 MR. ROSENTHAL: Sure.

23 Q. Do you have any knowledge of the methodology that PATH
24 used when investigating and addressing the safety aspects of
25 the subject injury event?

1 A. Yes.

2 Q. And where does that information come from?

3 A. The discovery in this case. In other words, the
4 testimony of the witnesses and the documents I was provided
5 talk about what PATH does when somebody gets injured in an
6 event.

7 Q. And what did you extract from those materials
8 regarding that issue?

9 A. That their response was not to look at the system but
10 to say that the user, Mr. Foder, didn't follow the book of
11 rules, that he was supposed to go out and evaluate the
12 safety of the climb system before he used it, and that it
13 was his fault because he didn't assure that the system was
14 safe before he used it.

15 Q. Now, based on your knowledge of the methodologies of
16 PATH when PATH investigated and addressed the safety aspects
17 of the subject injury event, did PATH follow accepted safety
18 procedures as defined in the sciences and principles you
19 have cited?

20 A. They did not. In other words, they didn't do a hazard
21 analysis to figure out if there was something wrong with the
22 system. They just said he should have been more careful.

23 Q. And based on the sciences you've explained and based
24 on your application of the facts presented in this case, did
25 you formulate an opinion with regard to how the actions of

1 PATH compared to accepted safe practices as related to the
2 happening of this injury event?

3 A. I did.

4 Q. And please explain that opinion.

5 A. The principles of safety say that you have to evaluate
6 systems using the sciences of safety to identify hazards of
7 significant risk and mitigate them.

8 They didn't do that, so that accepted safe
9 practice would have had them properly evaluate the climb
10 system and identify the dangerous conditions and fix the
11 dangerous conditions.

12 Q. If PATH had non-slip tape on the edge of the
13 anti-climber, would that have solved the problem?

14 A. Yes. According to the event as it's been explained,
15 the initiation of loss of control was a slip of the foot,
16 and if there was anti-slip material, then to a reasonable
17 degree of certainty, he wouldn't have initially slipped and
18 then he wouldn't have subsequently slipped off the system.

19 Q. Now, other than putting non-slip tape on the
20 anti-climber, what could PATH have done to eliminate or
21 minimize the hazards that we're talking about?

22 A. If you weren't going to fix the climb system by
23 designing it properly or posting warnings on it not to use
24 it without inspecting all of the surfaces and your footwear
25 and everything else before you climb on it, you could

1 instruct the workers not to use it unless it's absolutely
2 necessary, and then under -- only with a climbing aid.

3 Q. Okay. Now, what would have happened to Steven Foder
4 if the climb system on the end of the railroad car he used
5 to enter the car was made safe at the time of his injury
6 event as you have described?

7 A. It wouldn't have happened.

8 Q. And according to the safety sciences and principles
9 you have described, did PATH violate the applicable standard
10 of care with respect to safety of the subject climb system?

11 A. Based on safety science, yes.

12 MR. ROSENTHAL: Thank you.

13 THE COURT: Okay. Your witness.

14 CROSS-EXAMINATION

15 BY MR. MINO:

16 Q. Mr. Widas, you never worked for a railroad; correct?

17 A. Not as an employee, no.

18 Q. Okay, and you've never been a train engineer?

19 A. No.

20 Q. No. Okay. And so you haven't had to do the
21 day-to-day duties of a switchman?

22 A. Correct.

23 Q. Okay. You've never had to inspect trains to determine
24 whether or not they comply with FRA standards and then
25 report that to the FRA?

1 A. Not as a regulatory person, no.

2 Q. Okay. Now, and just so I'm clear, all of your
3 testimony with respect to FRA guidelines, you are not
4 testifying in a regulatory sense; correct?

5 A. Correct.

6 Q. So you are not testifying that PATH is out of
7 compliance with FRA regulations; correct?

8 A. I would consider that a legal question and beyond
9 safety engineering.

10 Q. Okay. Now, this isn't the first time you've testified
11 in a courtroom today; right?

12 This isn't the first time you've ever testified in
13 a courtroom, is it?

14 A. Correct.

15 Q. And this actually isn't the first time that you've
16 been hired by Plaintiff's attorneys to testify in a case, is
17 it?

18 A. That's correct.

19 Q. How many times has Plaintiff's attorney hired you?

20 A. I would estimate between 15 and 25 times over 30
21 years.

22 Q. Okay. And you're being paid today; right?

23 A. Correct.

24 Q. How much are you being paid?

25 A. My rate is \$395 per hour as the income for my firm.

1 Q. Okay. And you were also paid to write a report in the
2 matter; right?

3 A. Correct.

4 Q. How much were you paid to write the report?

5 A. I don't remember off the top of my head, but I would
6 estimate in the neighborhood of six or \$7,000.

7 Q. And have you ever been asked to evaluate PATH before?

8 A. Yes.

9 Q. How many times?

10 A. I don't know specifically. I would estimate four
11 times.

12 Q. Four times.

13 A. More or less.

14 Q. Okay, and of those four times, you always found that
15 PATH did something wrong, didn't you?

16 A. Yes.

17 Q. Okay. So not once did you find they were safe.

18 A. Correct.

19 Q. Okay. Now, you didn't review -- or you can tell me if
20 I'm wrong, in looking at your list of documents reviewed,
21 you didn't review any of the daily inspection reports in
22 this case, did you?

23 A. Correct.

24 Q. Okay. And you didn't review the blue sheet that
25 Mr. Wallace brought with him yesterday?

1 A. Correct.

2 Q. Okay. And did you hear Mr. Wallace testify?

3 A. Yes.

4 Q. Okay. Do you remember generally his testimony?

5 A. Yes.

6 Q. Okay. So when Mr. Wallace testified that the C.F.R.
7 regulations with respect to sill steps, PATH had been
8 exempted from, you didn't know that when you wrote your
9 report, did you?

10 A. Correct.

11 Q. Okay. So, even understanding that PATH is exempt from
12 it, you still think it applies.

13 A. Oh, to the extent that it discusses the issues that
14 we're talking about, which is the concentric and symmetrical
15 grabs with respect to steps, yes, it's a safety reference.

16 Q. Well, I believe it discusses it with respect to sill
17 steps, which this is not.

18 A. Correct. There is no standard for this.

19 Q. Right.

20 A. It's most like a sill step because there's no door
21 over the step. Even though it's not a sill step, it's the
22 closest thing that there is in the FARs.

23 Q. So you just made your own arbitrary decision that this
24 is the closest.

25 A. No. I used the words in the regulation.

1 Q. So how did you determine that this was the closest and
2 not some other regulation?

3 A. Okay. You've got me confused now.

4 Q. Fine. Then I'll withdraw it and we can go back.

5 You understood even when you wrote the report we
6 were not dealing with a sill step.

7 A. Correct.

8 Q. But you decided that, I'm going to look at sill step
9 regulations anyway.

10 A. Of course. They are a step. They are a climb system
11 on a railroad car.

12 Q. So any climb system on a railway car would do for you?

13 A. I can't hear your last words.

14 Q. Any climb system on a railway car would work for you.

15 A. Sure.

16 Q. Okay.

17 A. As a reference.

18 Q. All right. Now, did you also hear the testimony of
19 Ken Wallace that the FRA came and looked at the cars when
20 they were initially delivered to PATH?

21 A. Yes.

22 Q. So is it your testimony that the FRA failed?

23 A. Yes.

24 Q. Okay. So you would disagree with the Federal Railroad
25 Administration that these cars didn't violate any standards.

1 A. If, in fact, they said that, correct.

2 Q. But again, you're not an FRA inspector.

3 A. Correct.

4 Q. Now, you said that PATH could mitigate this by placing
5 some sort of anti-slip material on the edge of the
6 anti-climber; correct?

7 A. Correct.

8 Q. Okay. Is there any regulation that you can point to
9 that specifically says PATH must have grip tape on the edge
10 of the anti-climber?

11 A. No.

12 Q. Now, let's talk about some of the assumptions you made
13 in your report.

14 You reviewed the -- you call it a TH 350, but it's
15 actually the TH 360, the accident report that Mr. Foder
16 filled out. It's Exhibit A in evidence.

17 A. Okay.

18 Q. Okay. You reviewed that?

19 A. I reviewed it if it says so in my report. Yes, I
20 recall that.

21 Q. Okay. Now, you also then chose to ignore the
22 description of the accident provided in that; correct?

23 A. No, that's not correct.

24 Q. Okay. So based on the description provided in that
25 report, how did the anti-climber come into play?

1 A. Just based on that report?

2 Q. Yes.

3 A. It didn't.

4 Q. Okay.

5 A. Except that it was more than four feet above the track
6 level from which he was stepping.

7 Q. So that report does not mention the anti-climber at
8 all, does it?

9 A. Correct.

10 Q. So we'll go back to my question. You ignored that
11 portion of it. You said, you know what, I'm not going to
12 pay attention to that; this report never mentions the
13 anti-climber.

14 A. Incorrect.

15 Q. Okay. Explain it, then.

16 A. Well, that was a piece of information among a whole
17 lot more information, and when Mr. Foder testified in his
18 deposition and gave the complete version of the event with
19 all of the facts, that's what I relied upon.

20 Q. Well, so within that statement, you're making the
21 assumption that it's the complete version and not just a new
22 version.

23 A. It is factual. In other words, his -- when I read a
24 deposition, the words that people say are the words that
25 people say. It's not for me to say whether they're lying or

1 not. I make a determination as to whether or not it's
2 consistent with physical science, and as we've already
3 discussed, his version is perfect with respect to physics.

4 Q. So the version written on the 360 report where his
5 hands just slip and he falls backward: Not consistent with
6 science.

7 A. Sure it is.

8 Q. Okay.

9 A. As an element of the overall story as we knew it once
10 we heard the whole story.

11 Q. This is -- again, you're assuming that's the whole
12 story as opposed to just a new story he decided to tell;
13 correct?

14 A. Oh, yes, I don't -- I don't -- it's up for these
15 people to decide whether Mr. Foder is telling the truth or
16 not.

17 Q. I'm talking about your report, the assumptions that
18 you made that went into your report.

19 A. I made no assumptions. I used the words that he
20 testified to in his deposition.

21 Q. Now, do you have your report in front of you?

22 A. Yes.

23 Q. Okay. That diamond plate, on the edge, right, you
24 said that you did some work with OSHA; correct?

25 A. Yes.

1 Q. That diamond plate is OSHA-recognized as
2 slip-resistant; correct?

3 A. Not all diamond plate, no. That's a mistake.

4 Q. Okay. How about that diamond plate?

5 A. I'm going to just advise that based on the -- the
6 explanation of where friction comes from that we talked
7 about before, if the bearing surfaces of that raised lug
8 metal plate are smooth and flat, it's slippery.

9 Q. Okay. But you didn't measure the friction surfaces on
10 that diamond plate.

11 A. Correct.

12 Q. In fact, you measured no friction surfaces anywhere on
13 that train.

14 A. Correct.

15 Q. Okay. But you're fine with saying that friction
16 surfaces are slippery without measuring them.

17 A. Absolutely. I measured thousands of surfaces.

18 Q. Okay. If you go to page 33 of your report, on page
19 33, you conclude that the grab bars are excessively offset
20 with respect to the forces necessary to climb the train.

21 A. Keep going. I can't hear you. I'm mostly deaf.

22 Q. My apologies.

23 So is it the fourth paragraph on page 33. All
24 right?

25 A. Correct.

1 Q. "The available grab bars were excessively offset and
2 asymmetrical with respect to the forces necessary for a
3 person using the climb system..."

4 A. Correct.

5 Q. At what point did you measure the forces necessary for
6 Mr. Foder to use the climb system?

7 A. I didn't have to.

8 Q. Oh, okay. So you don't have to do any measurements to
9 decide what the forces necessary are.

10 A. No.

11 Q. No. So you're just -- right. You've done enough; you
12 just go with your gut?

13 A. No, the laws of physics and our vector analysis will
14 tell us what we need to know without measuring anything.

15 Q. Where in your report did you do the vector analysis?

16 A. Right there in that paragraph.

17 Q. Oh I'm sorry, I misunderstood. I thought a vector
18 analysis would have numbers.

19 A. Okay. Well, then, let's -- what's the question? I'm
20 sorry.

21 Q. I said, I understood from your testimony a vector
22 analysis would have numbers. There's no numbers involved?

23 A. Correct. It's principles.

24 Q. Principles. Okay.

25 So you give in your report a couple different

1 physics formulas. Did you ever actually plug any numbers
2 into those physics formulas?

3 A. No, not necessary.

4 Q. Again, numbers are not necessary for you.

5 A. No numbers are necessary.

6 Q. Okay.

7 Now, in the next paragraph, you say that "The grab
8 bars were of smooth hard metal, which substantially reduced
9 the available grip-slide-resistance."

10 What is the actual grip-slide-resistance of those
11 grab bars?

12 A. I didn't measure it.

13 Q. Okay.

14 A. It's a smooth metal.

15 Q. Okay.

16 A. No asperities.

17 Q. Again, no numbers necessary.

18 A. No numbers necessary.

19 Q. All right. And then you say, in foreseeable
20 contaminated/lubricated conditions.

21 A. Yes.

22 Q. Okay. Now, did you hear the testimony of Dennis
23 Velez, or were you not here for that yet?

24 A. I heard a lot of it. I didn't hear it all.

25 Q. Okay. Mr. Velez was the car inspector that came out

1 and looked at the car immediately after the accident.

2 A. Yes.

3 Q. Now, are you aware that he found no grease on the car?

4 A. I don't recall him -- I think I was here for that. I
5 don't recall him saying that he looked for any.

6 Q. No, he testified there was no grease on the car.

7 A. Okay.

8 Q. Okay. So that would be one contaminant that isn't
9 there.

10 A. Okay.

11 Q. All right?

12 A. Sure.

13 Q. And he testified there was no oil on the end step or
14 the grab bar or the anti-climber.

15 A. If that's what he said.

16 Q. Okay. So that's another contaminant that we don't
17 have to worry about.

18 And he testified that there was no water on the
19 end step, anti-climber, or grab bar; right?

20 A. If you say so.

21 Q. Okay. So that's another contaminant.

22 So what contaminant are you talking about here?

23 A. He said he didn't see any.

24 Q. Oh, okay.

25 A. No, he said if he saw large grease or oil or on -- on

1 the walkway, he would report it.

2 Q. There was also testimony about the end step, the
3 anti-climber, and the grab bar. You may not have caught it
4 or it may have either been before, or you weren't paying
5 attention, that's fine.

6 A. Okay. Sure.

7 Q. And if he testified to that -- and I just need these
8 photos. If he testified to that, what other contaminants
9 would you be talking about?

10 A. No, none.

11 Q. None. Okay. So then actually, there is no
12 contaminated condition on that day.

13 A. Oh, that's for these people to decide.

14 Q. But you've made that assumption in your report that
15 there was a contamination that day, despite the testimony of
16 Dennis Velez.

17 A. No, that is not what the words say that you just read.

18 Q. Okay.

19 A. It's foreseeable, and Mr. Avril said it over and over
20 again, that contaminant -- contamination from the surfaces
21 is highly foreseeable.

22 Q. All right. So you said on the day you did your site
23 visit that there was grease everywhere; right?

24 A. I didn't say that.

25 Q. No? Did you see any grease in the track area when you

1 went to go look at it?

2 A. I saw discoloration of the surface -- the materials on
3 the walkway surfaces. I did not analyze them.

4 Q. Oh, okay.

5 A. And I was there over four years later, so I didn't
6 analyze them because it wouldn't be relevant.

7 Q. So did you see any oil in the walkway area?

8 A. I saw discoloration and other materials. I didn't do
9 any chemical analyses or other detailed analyses more than
10 four years after the event.

11 Q. Okay. So you have no idea what that dark
12 discoloration or however you would like to term it was, do
13 you?

14 A. Correct.

15 Q. Okay. So then you actually have no personal knowledge
16 of oil being in that track, do you?

17 A. Correct.

18 Q. No personal knowledge of grease being in that track?

19 A. Correct.

20 Q. Did you see the track greasy that day when you were
21 there?

22 A. No.

23 Q. Okay.

24 A. Didn't look for it.

25 Q. Did you take any measurements with respect to the slip

1 resistance anywhere on this PATH train?

2 A. You keep asking me that, and I'm not supposed to
3 answer that, so -- no, I didn't, because --

4 MR. ROSENTHAL: Your Honor, could we have a
5 sidebar?

6 THE COURT: Sure.

7 (The following takes place at sidebar)

8 MR. ROSENTHAL: He keeps on asking the same
9 question, and the answer that Mr. Widas can't give us is, he
10 couldn't measure it because there was slip tape on there,
11 and if he keeps asking that question, that's going to be the
12 answer, he's going to open the door.

13 THE COURT: All right. So be forewarned. If
14 that's the answer, you know, I couldn't measure it because,
15 be careful.

16 MR. MINO: Well, he answered that question, he
17 said I couldn't measure it because the conditions were
18 different.

19 THE COURT: Right.

20 MR. ROSENTHAL: That's what --

21 THE COURT: But you're pushing it. You made the
22 point, number one.

23 MR. MINO: Then I'll withdraw the question.

24 THE COURT: Here's another point. You keep going
25 back to the report. You should ask him about his testimony.

1 They don't have the report, they're not going to get the
2 report.

3 Was his deposition taken

4 MR. MINO: No.

5 THE COURT: You know, I don't want to say anything
6 and stop you, but he never testified about -- it's not even
7 proper cross because he never testified about his report,
8 ever. He alluded to it, but his conclusions were not
9 verbatim out of the report, and you keep going through the
10 report point by point. You know, it's really beyond what he
11 testified. You have a report, and he testified to part of
12 it at trial, and that's what the cross should be.

13 So, you know, think about that instead of telling
14 the jury, Didn't you write this in your report. They're
15 going to go back and say -- they're not going to get the
16 report.

17 I'm not going to tell you how to do your job, but
18 it may be more effective to limit the cross-examination to
19 the direct testimony, which is what he said his conclusions
20 are.

21 But I'll leave it to you if there's no objection to
22 it.

23 MR. ROSENTHAL: Well, I object to this question.

24 MR. MINO: I'll withdraw this question.

25 THE COURT: Let's move on. I think they got the

1 point about nothing being measured, okay?

2 (The following takes place in open court)

3 BY MR. MINO:

4 Q. During your site visit, did you ever climb up the
5 train the way Mr. Foder did?

6 A. No.

7 Q. Did you use the same climb system?

8 A. No.

9 Q. No. Okay.

10 Now, you testified about PATH's lack of a hazard
11 analysis.

12 A. Correct.

13 Q. Okay. Are you aware if that was ever asked for?

14 A. As far as I know, they don't do that, so I don't know
15 who would ask for it, but...

16 Q. And you testified that Mr. Foder, he's a locomotive
17 engineer, so he doesn't need to -- or it's not his job to
18 inspect certain areas.

19 A. Correct.

20 Q. Okay.

21 A. From a safety perspective. In other words, you don't
22 rely on a locomotive engineer walking to his train to
23 inspect the whole facility before he gets to the controls in
24 the locomotive.

25 Q. Would you rely on Mr. Foder to look in the area where

1 he's walking?

2 A. Yes.

3 Q. Okay. And in looking in the area where he's walking,
4 you would rely on Mr. Foder to avoid any grease or oil in
5 the track; right?

6 A. Yes, if it's perceptible.

7 Q. Okay. So Mr. Foder does have a role to play in his
8 own safety; correct?

9 A. Of course.

10 Q. So it's not as if you're saying that PATH has to -- or
11 that it's all on PATH, and Mr. Foder can just kind of do
12 whatever he wants.

13 A. Correct.

14 MR. MINO: I have nothing else.

15 MR. ROSENTHAL: Just very briefly, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. ROSENTHAL:

18 Q. Counsel asked you questions about vector analyses and
19 forces necessary to do things, and you said that you didn't
20 need numbers to do that. Why not?

21 A. Because we know from our demonstration and our
22 understanding of vector analysis that as soon as we become
23 asymmetrical or eccentric, we generate forces along the
24 surface that require a traction demand. An absolute number
25 is not necessary. We just know that now we must protect

1 against slipping. So we have to do something to protect
2 against slipping.

3 Q. Does the steel protect against slipping?

4 A. Smooth bare metal does not have protection against
5 slipping.

6 Q. What would have protection against slipping?

7 A. Grit-impregnated material on the smooth metal.

8 Q. So like a non-slip tape type of thing?

9 A. Plasma coating, non-slip tape, yes.

10 Q. And actually, on the sill step, they had that?

11 A. Correct.

12 MR. ROSENTHAL: Thank you.

13 THE COURT: I have one question for the witness.

14 Sir, you testified about asymmetrical hand bars;
15 right?

16 In that picture, where do you believe that the
17 hand bar should have been?

18 THE WITNESS: Over the step.

19 THE COURT: Well, can you demonstrate on the
20 picture?

21 THE WITNESS: Yes. (Referring to P-23A)

22 (The witness points)

23 THE COURT: Let counsel see.

24 THE WITNESS: Now, there are other devices
25 associated with the operation of the railroad car in that

1 vicinity. You might be able to design one that's a little
2 lower here, but it certainly can't interfere with this
3 device, so it would have to be above that.

4 THE COURT: And wouldn't that be a lot higher than
5 the lower hand bar is there? Because you're all the way
6 down below on the track.

7 THE WITNESS: Correct.

8 THE COURT: How could you possibly grab something
9 that high up?

10 THE WITNESS: It's an unsafe climb system, so you
11 have to make sure that -- the slip resistance is the number
12 one solution.

13 THE COURT: Okay.

14 THE WITNESS: Okay? I would have to design --
15 start from scratch with the car to answer your question,
16 Your Honor. So the quick fix is the anti-slip.

17 THE COURT: Okay.

18 Additional questions?

19 MR. MINO: Yes.

20 THE COURT: Go ahead.

21 RECROSS EXAMINATION

22 BY MR. MINO:

23 Q. The traction demand that you just testified about; the
24 diamond plate would provide the increased traction demand,
25 correct?

1 A. Not necessarily. It has to have sharp asperities on
2 the raised lugs. If the raised lugs are smooth, you don't
3 get anything.

4 Q. If it had the sharp asperities --

5 A. Asperities.

6 Q. -- asperities, it would provide the traction demand;
7 correct?

8 A. Correct.

9 Q. Okay.

10 And if it had the asperities, it would be safe to
11 use the climb system if the employees were instructed to
12 place their entire foot on the diamond plate; correct?

13 A. No. You can't make an unsafe system safe by telling
14 the people, do something unnatural, because if you do
15 something unnatural, there will be times when they won't do,
16 it for a number of different reasons.

17 Q. How do you know it's unnatural? How do you know it's
18 unnatural?

19 A. Biomechanics, ergonomics, human factors tell us if
20 we're going to step from that floor to something this high,
21 one foot, one move, you're not going to get it flat.

22 Q. Now, I understand that you never did it. Did you ever
23 watch anyone do it?

24 A. The fact that a contortionist could do something
25 doesn't make the system safe for the people who are going to

1 use it.

2 Q. I didn't ask if you saw a contortionist do it. Did
3 you ever see anyone from PATH do it?

4 A. I don't recall. I've seen people walk on -- climb
5 onto trains, and I've climbed onto trains. It can be done.
6 That doesn't make it safe.

7 Q. So you would move this out? Just so I'm
8 understanding, you would move the grab bar out to make it
9 safe?

10 A. I would make a grab bar over the step by either moving
11 the step, changing the whole system. We'd have to start
12 from the beginning to get a system that meets the safety
13 requirements.

14 Q. Okay. But I'm a little confused. Your testimony
15 originally was, you're not saying the design was bad. You
16 said that initially when Mr. Rosenthal questioned you.

17 A. Correct. I'm not arguing the design defect case here.
18 What I'm arguing is it's an unsafe workplace. You can make
19 it safe by making the landing area on the edge of the upper
20 level slip-resistant.

21 MR. ROSENTHAL: Objection, Your Honor, just to
22 beyond the scope.

23 THE COURT: I'm going to allow it.

24 Q. So then actually, you don't need to move the grab bars
25 and the end step at all.

1 A. You would have if you wanted to make it a safer,
2 safest system.

3 Q. Okay. But your testimony is, what they really should
4 have done is done something to the steel edge?

5 A. Correct.

6 Q. Okay. Something beyond instruction, instructing
7 employees to put their entire foot on the diamond plate?

8 A. Correct, because that's not practical.

9 MR. MINO: Nothing further.

10 THE COURT: Thank you.

11 THE WITNESS: You're welcome.

12 THE COURT: Have a good day.

13 THE WITNESS: Thank you.

14 THE COURT: You're excused.

15 You can leave the pictures there. Okay?

16 THE WITNESS: I'm leaving everything.

17 THE COURT: Excellent.

18 (Witness excused)

19 THE COURT: Shall we put the witness on first, the
20 live witness, at this time?

21 MR. ROSENTHAL: As long as we can get the whole
22 doctor's tape in.

23 MR. MINO: I do not plan on being very long with
24 her, but -- so I would appreciate the courtesy, but, you
25 know, it's --

1 MR. ROSENTHAL: I have no problem with the
2 courtesy. It's a matter of, this is it, and if we have to
3 leave by five, I'd prefer to make sure that my case was in.

4 THE COURT: Let me call the lawyers to sidebar for
5 one minute.

6 (Side bar conference held off the record)

7 THE COURT: Ladies and gentlemen, it's movie time.

8 I'm going to give you an instruction, it's called
9 Videotape Deposition. I'm going to instruct you as follows.

10 A deposition is the sworn testimony of a witness
11 taken before trial. The witness is placed under oath and
12 swears to the truth, and lawyers for each party may ask
13 questions. A Court Reporter is present and records the
14 questions and answers.

15 The deposition of Dr. Justin Greisberg was taken
16 on October 31, 2016, and is about to be presented to you by
17 a video.

18 Deposition testimony is entitled to the same
19 considerations and is to be judged, insofar as possible, in
20 the same way as if the witness here had been present to
21 testify. Do not place any significance on the behavior or
22 tone of voice of any person reading the questions or
23 answers.

24 Okay? And with that instruction, we're going to
25 proceed with the deposition.

1 We'll take a very brief break after the video, and
2 then we'll have a final witness for the afternoon, and then
3 we'll break for the day. Okay?

4 All right.

5 MR. MINO: Your Honor, I just want to put these
6 back up. I accidentally took them back.

7 THE COURT: Okay. If the witness is done, why
8 don't you give them to Amy?

9 MR. MINO: Sure.

10 Thank you.

11 (The videotaped deposition of Dr. Justin Greisberg was
12 played.)

13 THE COURT: Would you rather have the lights
14 dimmed?

15 Want to dim the lights?

16 MR. ROSENTHAL: Is that loud enough?

17 THE COURT: It's good.

18 Can you hear it?

19 MR. ROSENTHAL: Stop. Stop it. The jury can't
20 hear it.

21 THE COURT: Can everyone hear over there?

22 A JUROR: It can be a little louder.

23 THE COURT: Okay. Louder. Let's make it a little
24 louder.

25 (The videotaped deposition of Dr. Justin Greisberg was

1 played.)

2 (Playback ends)

3 MR. ROSENTHAL: Your Honor, may we come to
4 sidebar?

5 (The following takes place at sidebar)

6 MR. ROSENTHAL: The only issue that was off the
7 video is, counsel -- we had authenticated the records and
8 asked him about all of his records and what were his
9 records. I showed him all the exhibits, and I asked counsel
10 whether he would stipulate to that so we don't have to bore
11 the jury with that.

12 I think he wants me to read it.

13 THE COURT: Read what?

14 MR. ROSENTHAL: "Doctor, I showed you a number of
15 exhibits. Is this a true and correct copy of your report?

16 "Yes."

17 That sort of thing.

18 THE COURT: I'm not sure what you're asking me.

19 MR. ROSENTHAL: There's more to -- that we might
20 have to read to the jury.

21 THE COURT: For what purpose?

22 MR. ROSENTHAL: I suspect to authenticate the
23 documents, is this a true and correct copy --

24 THE COURT: But we're not admitting the documents
25 into evidence.

1 MR. ROSENTHAL: His records?

2 THE COURT: Why would they? I'm asking you.

3 MR. ROSENTHAL: They're his medical -- they're the
4 medical records, operative report.

5 THE COURT: Is there opposition to the medical
6 records?

7 MR. MINO: The correct questions one asks to get
8 the medical records in as far as, is it -- is it in the
9 usual course of business to do it, were the records made at
10 or about the time, things like that. It's a borderline
11 thing --

12 THE COURT: Look, here's the problem.

13 MR. MINO: But --

14 THE COURT: Here's the problem. It's 4:20. We
15 can table this and come in early tomorrow, stay late
16 tomorrow night. I'm not adjourning this trial. You did it
17 at your own risk with your witness. I don't know why we're
18 fighting about this now if you have a witness that has to be
19 out of here, and the jury wants to leave at five, and I have
20 to give them a bathroom break.

21 So are we finished the video dep that we need to
22 show the jury at this moment with the videographer?

23 MR. MINO: We're fine with the records coming in.

24 THE COURT: Okay. So do you agree that all his
25 medical records can come in that the doctor reviewed?

1 MR. MINO: Yes.

2 THE COURT: Any objection to them?

3 MR. MINO: The records that he relied on in his
4 treatment, his medical files can come in, yes.

5 THE COURT: Is there anything that can't come in
6 that you object to?

7 MR. MINO: Are you trying to get the records of
8 Dr. Berberian in?

9 MR. ROSENTHAL: No. Just his records.

10 MR. DiGIULIO: No, just the stuff we showed him.

11 THE COURT: Okay. That's fine. So we don't have
12 to read that. That's stipulated. They'll come in.

13 And then we can take a quick break, and you can
14 put your witness on in 10 minutes.

15 MR. ROSENTHAL: Right, and I'll offer the exhibits
16 tomorrow.

17 THE COURT: Tomorrow. Perfect. You can just move
18 them in outside the presence of the jury and then they get
19 them.

20 MR. ROSENTHAL: Great.

21 THE COURT: Perfect.

22 All right. 10-minute break.

23 (The following takes place in open court)

24 THE COURT: All right. Ladies and gentlemen of
25 the jury, we'll have a quick, 10-minute break, go to the

1 bathroom, have something to drink, we'll send in some
2 cookies, and then we'll come back in.

3 I promise we'll break at five today.

4 Thank you.

5 THE COURT CLERK: All rise.

6 (The jury exits)

7 (Recess taken)

8 (Jury out)

9 THE COURT CLERK: All rise.

10 (The jury enters)

11 THE COURT: Okay, everyone. Thank you for coming
12 back. We'll try to get you out of here by five. We'll
13 proceed.

14 Any motions that need to be made?

15 MR. MINO: Yes.

16 THE COURT: Why don't we preserve them until
17 later, in the interests of efficiency. Let's proceed with
18 Defendant's witnesses.

19 MR. MINO: Yes.

20 Defendant calls Sandra Bou.

21 THE COURT: Ms. Bou, come forward.

22 Do you swear or affirm?

23 THE WITNESS: Yes.

24 THE COURT: Which one?

25 THE WITNESS: I swear.

1 THE COURT CLERK: Raise your right hand, place
2 your left hand on the bible, please.

3 S A N D R A B O U, called as a witness on behalf of the
4 Defendant, and having been duly sworn, testified as follows:

5 THE COURT CLERK: Please state your full name for
6 the record and spell it, please.

7 THE WITNESS: My name is Sandra Bou, S-a-n-d-r-a,
8 B-o-u.

9 THE COURT: You can have a seat.

10 THE WITNESS: Thank you.

11 DIRECT EXAMINATION

12 BY MR. MINO:

13 Q. Good afternoon, Ms. Bou.

14 Are you currently employed?

15 A. Yes.

16 Q. And by who?

17 A. PATH.

18 Q. Okay. And what's your current position within PATH?

19 A. I'm a conductor.

20 Q. How long have you been a conductor?

21 A. About six years.

22 Q. On July 22nd, 2011, what was your position with PATH?

23 A. A conductor.

24 Q. Okay. And were you working on July 22nd, 2011?

25 A. Yes.

1 Q. Okay. Were you working with Steven Foder?

2 A. Yes.

3 Q. And what was your job assignment that day?

4 A. We were taking the light train from S-1 to World Trade
5 Center.

6 Q. And S-1, is that Journal Square?

7 A. Yes.

8 Q. Had you worked with Mr. Foder before July 22nd, 2011?

9 A. Yes.

10 Q. About how many times?

11 A. A few weeks. I can't remember.

12 THE COURT: You can use the microphone so we can
13 all hear. Okay?

14 THE WITNESS: Oh, okay.

15 THE COURT: Thank you.

16 Q. Now, in order to get to the train that you were
17 picking up, did you have to walk on track level?

18 A. Yes.

19 Q. Okay. Now, on July 22nd, 2011, when you were walking
20 on track level, do you recall seeing any grease in the
21 ballast?

22 A. I don't remember.

23 Q. Okay. Do you recall, when you had to get over to
24 S track, did you have to walk across 1 track?

25 A. Yes, you do.

- 1 Q. And walk across wooden planks?
- 2 A. Yes.
- 3 Q. Do you recall seeing any grease on the wooden planks?
- 4 A. I don't remember.
- 5 Q. Do you recall seeing any oil on the planks?
- 6 A. I can't remember.
- 7 Q. How about any water?
- 8 A. I can't remember.
- 9 Q. Okay. Now, at some point, you get to the PATH train
- 10 car?
- 11 A. Yes.
- 12 Q. Okay. And did you begin to climb up the PATH train
- 13 car?
- 14 A. Climb up on the train?
- 15 Q. Yes.
- 16 A. Yes.
- 17 Q. Okay. And on July 22nd, 2011, describe for me how you
- 18 climbed up on the PATH train car.
- 19 A. You climb up from the back --
- 20 Q. Okay.
- 21 A. -- of the train.
- 22 Q. Okay. Take me through the process, though.
- 23 A. Oh. Okay. So you put two hands on the handrail, a
- 24 foot in the foot rail, and your other foot goes on the
- 25 anti-climber.

1 Q. Okay. That day, which foot went into the foothold?

2 A. Climb on the right side because you can't climb on the
3 left side, you'll get hit by a train. So if I'm climbing on
4 the right side, looking at the train, I would have to put my
5 right foot in the foot rail, left foot would go on the
6 anti-climber.

7 Q. Okay. And on that day, were you able to put your left
8 foot on the anti-climber?

9 A. Yeah, I got on the train, yes.

10 Q. Okay. So on that date, did you have any problems
11 getting on the train?

12 A. Not that I can remember.

13 Q. Okay. Do you remember seeing any oil or grease on the
14 anti-climber?

15 A. I can't remember.

16 Q. Okay. As a conductor, did you receive any training on
17 how to get up on the -- how to use that system to climb up
18 the train?

19 A. Yes, we do. We received training.

20 Q. And when you climbed up that day, did you climb up as
21 you were trained?

22 A. That's the only way you can get on a train, honestly,
23 on that side.

24 Q. And how tall are you, Ms. Bou?

25 A. Five-one.

1 Q. And after you got on the train, at some point, did you
2 become aware that Mr. Foder fell?

3 A. Yeah, but I was already on the train. I didn't see
4 him fall if that's what you're --

5 Q. Well, that was going to be my next question.

6 A. Okay.

7 Q. Did you specifically see him fall?

8 A. No.

9 Q. Okay. So when you first saw Mr. Foder, where was he?

10 A. When I came out of the train?

11 Q. Yes.

12 A. He was on the floor.

13 Q. Okay. And did he say anything to you?

14 A. I don't really remember, that was so long ago, but
15 obviously he was in pain. He was on the floor.

16 Q. Okay. At any point did he tell you how he fell?

17 A. I think we were just in the middle of getting him
18 help.

19 Q. Okay.

20 A. If I can remember. I'm not -- he was hurt, get him
21 help, you know.

22 Q. Okay. So then you're not really sure one way or
23 another how he fell.

24 A. I didn't see him fall.

25 MR. MINO: I have nothing else.

1 THE COURT: Okay.

2 MR. ROSENTHAL: I'm sorry, Your Honor, we're going
3 to be here all night with this.

4 (Laughter)

5 MR. ROSENTHAL: I'm sorry, that was a bad joke.

6 THE COURT: It's late-in-the-day humor for
7 lawyers.

8 (Laughter)

9 THE COURT: Lawyers are not -- don't give up your
10 day jobs.

11 (Laughter)

12 THE COURT: None of us should.

13 CROSS-EXAMINATION

14 BY MR. ROSENTHAL:

15 Q. Ms. Bou, you worked with Mr. Foder for a couple of
16 weeks?

17 A. I think so, yes.

18 Q. Did you ever see him do anything unsafe?

19 A. No.

20 Q. Now, you got on that train that day the way that they
21 taught you to get on the train?

22 A. Yeah.

23 Q. Do you remember who taught you how to climb?

24 A. I do. It was Avril, our chief OE.

25 Q. And this is Plaintiff's Exhibit 23A.

1 You had both your hand on the rail?

2 A. Yes.

3 Q. And where on the rail did you have both your hands?

4 A. What do you mean? I'm holding the -- if I can see the
5 picture, I'll show you.

6 Q. Sure.

7 MR. ROSENTHAL: Your Honor?

8 THE COURT: Would you mind going around and
9 pointing to it?

10 THE WITNESS: Sure.

11 THE COURT: Put it back on the easel.

12 Mr. Rosenthal, why don't you put it back on the
13 easel and, let her come up and show the jury.

14 (The witness stepped down.)

15 Q. Yes, just tell the jury where your hands were.

16 A. Okay.

17 THE COURT: You have to speak up so our Court
18 Reporter can hear you.

19 A. I would put my hands on the -- the handrail should be
20 here. Yeah, that is the handrail. Okay. My hands would be
21 here. If you can see the handrail, you put two hands here.
22 Your foot has to go here. Has to be your right foot. Left
23 foot has to reach over here if you're climbing up on this
24 way. If you put your left foot in here, you would be going
25 that way. So, yeah, that's how you climb in.

1 Q. So just to be clear --

2 A. Two hands. I can't really see if that's the handrail.

3 Q. Right. There's a handrail that goes like that?

4 A. Yes, the two hands are here.

5 Q. But on the vertical part of the handrail?

6 A. Yes.

7 Q. Okay.

8 A. And the foot is there, and your left foot goes on the
9 anti-climber.

10 Q. Okay, and the anti-climber is this piece of steel?

11 A. It is the doorway frame in the doorway, yes.

12 Q. We see it up there?

13 A. Yes.

14 THE WITNESS: Do you want me to go back?

15 THE COURT: Yes.

16 Q. Yes, you can go back.

17 Now, the area -- I'll wait until you get on.

18 (The witness resumed the stand.)

19 Q. Now, the area where you walk in order to get to the
20 trains on S track, --

21 A. Yeah.

22 Q. -- there can be oil and grease and debris in that
23 area?

24 A. Yeah, and ballast.

25 Q. It's a railroad environment; right?

1 A. Definitely, yeah.

2 Q. And so there's always grease and oil and debris in
3 that area?

4 A. You can expect it, yes.

5 Q. Okay. And is there a greaser that goes by as well?

6 A. At various times, yeah, we have like a grease train
7 that goes out, yes.

8 Q. What does that do?

9 A. I'm not sure, but I know it greases the rails, I
10 think. I'm not sure.

11 Q. But that also can --

12 A. Yes, it affects the trains. It affects the brakes.
13 That's why, you know, we have to make sure we do brake tests
14 everywhere we go. Every terminal, we have to make sure the
15 brakes are working properly.

16 Q. Does the greaser affect the walking conditions as
17 well? Spreading the grease?

18 A. I mean, common sense, it would, you know.

19 MR. ROSENTHAL: Okay. That's all I have. Thank
20 you.

21 THE WITNESS: I don't know.

22 REDIRECT EXAMINATION

23 BY MR. MINO:

24 Q. Just, do you actually know whether or not the greaser
25 gets grease anywhere besides the tracks?

1 A. That's not --

2 Q. Besides the actual rails?

3 A. It's not my job. I don't know where the grease train
4 is -- what their actually their job is to do. I know it
5 greases the rails.

6 Q. And you have no memory one way or another whether or
7 not there was grease in the area where you walked on July
8 22nd, 2011.

9 A. I don't remember.

10 MR. MINO: I have nothing else.

11 RECROSS EXAMINATION

12 BY MR. ROSENTHAL:

13 Q. I want to just --

14 THE COURT: It's limited to the redirect.

15 MR. ROSENTHAL: Right, it's just about the
16 greaser.

17 Q. Do you remember testifying on August 28th, 2015?

18 A. What is that?

19 Q. In a deposition?

20 A. Was that the deposition? Okay. Yes, I did.

21 Q. And do you remember being asked about whether there
22 was oil on the walkway?

23 A. I don't remember that question, but I've been asked
24 that, yes.

25 Q. And do you remember giving, as part of your --

1 THE COURT: No, let me stop. Let's stop.

2 You're not going to paraphrase. You can read her
3 the question and the answer, and the next question is, was
4 this your question and that's the answer, and that's it.
5 Okay? And it has to be inconsistent with what she said. If
6 it's not inconsistent, I don't want you to read it to her.

7 MR. ROSENTHAL: It's essentially -- there's a --
8 yes. Do you want to read it first?

9 THE COURT: Yes, I do. Let's go to sidebar.

10 (The following takes place at sidebar)

11 THE COURT: It's not inconsistent.

12 "But was there oil on the walkway at that time?

13 "I wouldn't remember that. I'm just saying in
14 general, it is a railroad. There is going to be grease and
15 oil, you know, there is going to be -- there is going to be
16 a lot of things, you know.

17 "Sure.

18 "so if I said no there is no oil or no grease,
19 that would be lying. There is. We have trains that go by
20 and put grease on the rails so of course it is going to get
21 in other places. It is going to get on our shoes, it is
22 going to get everywhere.

23 "That is what I'm asking is you. Was there oil
24 and grease?

25 "I can't remember."

1 MR. ROSENTHAL: Right. It was just that.

2 THE COURT: If you want it. I think it's a close
3 call. I mean, she said she doesn't really know what the
4 greaser does.

5 MR. MINO: She said she doesn't know, and it's not
6 her job to know.

7 THE COURT: Here's what you're going to do.
8 You're going to read the question and read the answer, and
9 the jury is going to say it's consistent, but I'll let you
10 do it.

11 MR. MINO: The question starts there?

12 THE COURT: You're going to read the whole thing.
13 You're not going to argue with her. You're going to say, is
14 this your question and was that your answer on August 28th,
15 and then we're done.

16 MR. ROSENTHAL: Well, I'm going to read through
17 these two with the shoe in there.

18 THE COURT: Right, and read through "I can't
19 remember." Read the whole thing. I want context. Okay?

20 MR. DiGIULIO: Why don't you just ask, did it get
21 on her shoes?

22 THE COURT: No, you're not asking that. This is
23 redirect, guys. We're not going to kill this. You don't
24 get it: It's overkill. If you want to read it, you have
25 one question. You're going to read from here to line 15,

1 and then you're going to be done.

2 MR. ROSENTHAL: Okay.

3 THE COURT: Okay.

4 (The following takes place in open court)

5 BY MR. ROSENTHAL:

6 Q. I'm going to read for you questions and answers and
7 ask you if you remember --

8 A. Okay.

9 Q. -- giving the testimony.

10 A. Okay.

11 Q. "QUESTION: But was there oil on the walkway at that
12 time?

13 "ANSWER: I wouldn't remember that. I'm just
14 saying in general, it is a railroad. There is going to be
15 grease and oil, you know, there is going to be -- there is
16 going to be a lot of things, you know.

17 "QUESTION: Sure.

18 "ANSWER: So if I said no there is no oil or no
19 grease, that would be lying. There is. We have trains that
20 go by and put grease on the rails so of course it is going
21 to get in other places. It is going to get on our shoes, it
22 is going to get everywhere.

23 "QUESTION: That is what I'm asking is you. Was
24 there oil and grease?

25 "ANSWER: I can't remember."

1 Do you remember that questioning?

2 A. Yes, I do.

3 MR. ROSENTHAL: Okay. No further questions.

4 THE COURT: Okay. We're finished with this
5 witness?

6 MR. MINO: Yes.

7 THE COURT: Okay. You're excused. Thank you.

8 (Witness excused)

9 THE COURT: Any other witnesses for today?

10 MR. MINO: No.

11 THE COURT: Okay. Excellent.

12 So we're done a little bit early, ladies and
13 gentlemen of the jury. We're winding up. I think that
14 we'll get you out today at 20 of.

15 We have two witnesses tomorrow. One, you get to
16 watch another movie, and we get to have a live witness, and
17 hopefully, after that, the next step would be to give you a
18 charge and then hear closing statements.

19 If we can get the charge, we'll work on it
20 tomorrow, we'll charge you, and then -- or, if not, we'll do
21 it Friday morning, but I'm hoping we can give you the charge
22 tomorrow, and then we'll hear closing statements either late
23 tomorrow or early Friday morning.

24 So I think for sure we'll be done by Friday. So
25 you can count on tomorrow and Friday, but tomorrow for sure.

1 So we'll start tomorrow at 9:30.

2 I will reiterate a couple things. I want to thank
3 you for your attention. I'm not just saying this to flatter
4 a particular jury, but you've been very attentive and you've
5 been prompt and you've been a pleasure to have, and I
6 appreciate your service. I know I speak on behalf of the
7 lawyers in the room. This is important to both sides. So
8 attention is very much appreciated.

9 Your service is appreciated. I know it interferes
10 with your own personal schedules, and I am very grateful for
11 your service.

12 We are nearing the end, probably at the halfway
13 point.

14 And so please remember my initial instructions.
15 Don't talk about the case, don't do any research.

16 Have a good night's sleep. I think it's "Modern
17 Family" tonight, unless it's a rerun, and --

18 (Laughter)

19 THE COURT: And so that's safe. You can watch
20 "Modern Family." And then we will see everyone tomorrow at
21 9:30.

22 And thank you very much again. Okay?

23 THE COURT CLERK: All rise.

24 (The jury exits)

25 THE COURT: Okay, guys, so what's the story? Is

1 there a motion that you wanted to make?

2 MR. MINO: Yes.

3 At this time, PATH would like to make a motion for
4 directed verdict in this case.

5 I think Plaintiff has failed to make out a prima
6 facie case. I think what the evidence has shown here is
7 that the train was designed and at all times complied with
8 the FRA, the C.F.R. FRA regulations with respect to the end
9 step. The ones cited do not apply to PATH, that would be 49
10 C.F.R. 231.14, that PATH was specifically exempted from
11 that.

12 In addition, I believe the evidence also showed
13 that Mr. Foder was trained to place his entire foot on the
14 diamond plate of the anti-climber. If his foot went on the
15 smooth steel edge, that was improper, and therefore he is
16 responsible for the accident, and PATH has not done anything
17 wrong in this matter.

18 So for those reasons, PATH would move for a
19 directed verdict in this case.

20 THE COURT: Okay.

21 I'm not granting that directed verdict. I'm going
22 to table it and adjourn it until after the verdict comes in.
23 But I'm not inclined -- there's certainly evidence here of
24 negligence, and both sides have certainly cross-examined on
25 it, but there's certainly enough to go to the jury. But in

1 any event, I'm going to deny the motion without prejudice
2 and it can be renewed at the end of the case, after the jury
3 verdict comes in. I'm not granting the motion now.

4 MR. MINO: Thank you, Your Honor.

5 THE COURT: But so noted.

6 And so with that, we have a couple housekeeping
7 matters.

8 One is the exhibits. I know that Mr. Rosenthal
9 wanted to move a number of Plaintiff's Exhibits in.

10 MR. ROSENTHAL: Yes, Your Honor.

11 THE COURT: And I think I noted them. I think we
12 moved them. P-5A to P-5UU is in evidence already. Did we
13 move them already?

14 MR. ROSENTHAL: Yes, in evidence.

15 THE COURT: I have them marked in my book as in
16 evidence earlier. They're in.

17 Okay. Then we have the doctors' notes.

18 MR. ROSENTHAL: We have the exhibits from the
19 doctor's depositions, which were --

20 THE COURT: I can't move in things from
21 depositions. I can only move them in from exhibit books.

22 MR. ROSENTHAL: Okay. In the exhibit books, there
23 is P-11A, P-11B. They're all separately marked in the
24 exhibit book under Exhibit 11. P-11A, P-11B, P-11C. Do you
25 want me to list what --

1 THE COURT: P-11 is medical records of Justin
2 Greisberg?

3 MR. ROSENTHAL: Yes, they're all from that.

4 THE COURT: So it's only 11.

5 MR. ROSENTHAL: So, yes, it is all from 11.

6 THE COURT: That's it. So it's P-11, so all the
7 records that Dr. Greisberg reviewed.

8 MR. ROSENTHAL: Yes.

9 THE COURT: And that's all you're moving; correct?

10 MR. ROSENTHAL: That's all, yes.

11 THE COURT: Any objection to P-11?

12 MR. MINO: To the Dr. Greisberg records, no. They
13 were all part of his medical files.

14 THE COURT: Okay. So P-11 is in evidence.

15 (Plaintiff's Exhibit 11 marked in evidence)

16 MR. ROSENTHAL: And I'm not sure in terms of the
17 doctor's deposition whether that should be placed in
18 evidence or not.

19 THE COURT: No, it won't be. If they want a
20 readback, just like the trial transcript is not given, nor
21 would a tape. If they want a readback, we'll play it, and I
22 don't think they will, but you never know. We'll deal with
23 it if it happens.

24 MR. ROSENTHAL: Just trying to be safe.

25 Thank you.

1 THE COURT: I hear you.

2 Okay. Anything else?

3 MR. MINO: No. As far as tomorrow goes, we have
4 my liability expert, we have the doctor on tape.

5 Dr. Whitley, we may be able to -- I was really
6 just going to bring her in so she could authenticate her
7 medical records and that's it.

8 THE COURT: Dr. Whitley is your medical expert?

9 MR. MINO: No, Dr. Whitley is just the PATH
10 Medical doctor that Mr. Foder went to periodically
11 throughout, and she has medical records.

12 THE COURT: Can there be a stipulation to those?

13 MR. ROSENTHAL: From the Plaintiff, there can be,
14 Your Honor.

15 THE COURT: Right.

16 MR. MINO: I just want to make sure that my office
17 is fine with me stipulating to it and doesn't want to bring
18 her in.

19 THE COURT: Well, tell them that I'm fine with it.
20 I'm not going to have unnecessary witnesses for the jury
21 mand I'm not going to allow it if there's a stipulation. So
22 that answers the question.

23 MR. MINO: Okay.

24 THE COURT: I mean, if there's a strong reason, I
25 want to know why, but I'm not in the habit of wasting time

1 of the Court and the jurors if there's a stipulation. The
2 only purpose of putting her on would be to authenticate, and
3 there's a stipulation. That would be very silly to waste
4 everybody's time.

5 MR. MINO: I agree, and I will communicate -- I
6 can't imagine why they would, but I don't want to definitely
7 tell you no and then you hear tomorrow. That would be bad.

8 THE COURT: So who else do you have tomorrow?

9 MR. MINO: Gus Ubaldi is the liability expert.

10 THE COURT: And how long do you think his direct
11 will be?

12 MR. MINO: His direct will be, I don't know, an
13 hour, maybe a little bit less.

14 THE COURT: Okay.

15 MR. MINO: And then Dr. Dennis, the doctor on
16 videotape. His entire deposition is slightly over an hour.

17 THE COURT: Okay. So I think we should be
18 prepared to do summations tomorrow, and if we start promptly
19 at 9:30, and there's no issue on medical records.

20 So what we need to do, you've got the deposition
21 of Defendant's expert, and there's no objection to it coming
22 in, the video?

23 MR. ROSENTHAL: If it's just that one objection, I
24 have no objection to that.

25 MR. MINO: Yes, that was it.

1 THE COURT: Okay. So here's what we're going to
2 do, guys. I'm working on the jury instructions. Why don't
3 you take a break? Alex will get you -- the way I see it --
4 he's been doing research with me the last couple days.
5 There's really just a one-count complaint, right?

6 MR. ROSENTHAL: Just the FELA.

7 THE COURT: It's just the one charge. We've used
8 model from -- what circuit, Alex?

9 LAW CLERK SILAGI: Fifth Circuit, Eighth, and
10 Seventh.

11 THE COURT: Fifth, Eighth, and Seventh have model
12 instructions, so we took some of the language from those,
13 and we crafted a verdict sheet, and everything else is just
14 standard Federal, you know, weighing of the evidence, the
15 standard stuff.

16 So we'll give you a whole set. Since it's only
17 4:30, why don't you take a look at it and see if it's good.
18 We can get that out of the way, and then you can worry about
19 your closings tonight and we don't have to worry about
20 anything else.

21 Ideally, I'd love to get everything to the jury by
22 tomorrow, but if I don't think we can do it by tomorrow --
23 if we can't get everything done, then my sense is we'll just
24 do the closings Friday morning, we'll come at like 10 and do
25 closings.

1 But let's get the -- in the event that we can get
2 the jury charge done, I want to charge the jury before
3 closing statements. Okay?

4 So why don't we take a few minutes, and then as
5 soon as we have them ready, we'll bring them out.

6 MR. ROSENTHAL: Thank you, Your Honor.

7 MR. MINO: Thank you.

8 THE COURT CLERK: All rise.

9 (Recess taken)

10 (Jury out)

11 THE COURT: Gentlemen. Okay. Did you get a copy
12 of the jury instructions?

13 MR. ROSENTHAL: Yes, we did.

14 THE COURT: I'm going to mark them the first one
15 as Court Exhibit 4, which is the jury instructions, and then
16 the verdict sheet will be Court Exhibit 5.

17 (Court Exhibits 4 and 5 marked for identification)

18 THE COURT: Okay. Comments, objections? From the
19 Plaintiff?

20 MR. MINO: I'll let you start.

21 MR. ROSENTHAL: Okay. Plaintiff would ask that a
22 number of Plaintiff's proposed points be reconsidered and
23 placed into the --

24 THE COURT: Okay. Tell me which ones.

25 MR. ROSENTHAL: Number 11, which --

1 THE COURT: Do you have an extra copy?

2 MR. DiGIULIO: We have a copy right in here.

3 THE COURT: Are they in my books?

4 MR. DiGIULIO: Yes.

5 THE COURT: Tell me which number.

6 MR. DiGIULIO: The first book, they should be
7 inside the front cover. If you don't have it, there is a
8 copy right here.

9 THE COURT: I don't believe I have them. If you
10 want to hand them up, that will be great.

11 MR. DiGIULIO: May I approach?

12 THE COURT: Thank you.

13 MR. DiGIULIO: You're welcome.

14 THE COURT: Okay. So which ones would you like to
15 have added?

16 MR. ROSENTHAL: The first one is number 11, which
17 deals with the issue of foreseeability.

18 THE COURT: Any objection to the foreseeability
19 one?

20 MR. MINO: Yes. I would object to this particular
21 jury instruction, yes. It seems to just kind of go through
22 what type of evidence you can consider and things like that.
23 If there's a more general foreseeability charge, I am fine
24 with that. I'm not okay -- PATH is not okay with number 11.
25 If there is a model foreseeability charge that the Court has

1 ...

2 THE COURT: I don't know. I'll take a look at it
3 and let you know tomorrow.

4 MR. ROSENTHAL: And this one is a model.

5 THE COURT: Right, and what is it that you object
6 about in this one?

7 MR. ROSENTHAL: Are you --

8 THE COURT: No, Defendant. You're fine with it.
9 They say they object, they want a different one.

10 What is objectionable on this one?

11 MR. MINO: I just don't think that it needs to be
12 as explicit as it does about what evidence to consider
13 versus what evidence to not consider.

14 In Defendant's proposed jury instructions, there
15 is also a foreseeability.

16 THE COURT: Do you have that? I'm sorry, I don't
17 have it with me. Do you have a copy of yours?

18 MR. MINO: I should. It's in the same packet, in
19 the back.

20 MR. ROSENTHAL: It's their instruction number
21 four, it looks like.

22 THE COURT: Okay. I'll take a look and let you
23 know. I'll look through these cases and I'll see.

24 MR. ROSENTHAL: Just for the record, I'm
25 specifically objecting to that since I think it's crafted in

1 a way -- it's not a model charge, and it's crafted in a way
2 that's improper.

3 THE COURT: Okay. I get it. I'm going to take a
4 look at this tonight, and I'll let you know tomorrow, okay?

5 MR. ROSENTHAL: Do you want me just to read the
6 numbers --

7 THE COURT: Sure.

8 MR. ROSENTHAL: -- as opposed to going through
9 each one?

10 THE COURT: Tell me how you want to do it. We
11 just crafted this one from the model, the model that we had
12 on file. So you can tell me if there's any that you object
13 to in mine, or you could tell me, as we started to, they're
14 okay, but I want to add additional ones in, like number 11.

15 MR. ROSENTHAL: Yes. I think from Plaintiff's
16 perspective I have no objection to what is in yours. I do
17 have --

18 THE COURT: Additional ones you want.

19 MR. ROSENTHAL: -- additional ones that I want.

20 THE COURT: Okay.

21 MR. ROSENTHAL: And I do object to -- some of the
22 language in the verdict sheet, I think, should be a
23 little --

24 THE COURT: Let's talk about that in a minute.
25 Let's go through these first.

1 So you want 11 in, and what else do you want in?

2 MR. ROSENTHAL: Seventeen.

3 THE COURT: Hold on. Is that a model charge?

4 MR. ROSENTHAL: No, it is not.

5 THE COURT: Okay.

6 MR. ROSENTHAL: And the only thing I'm looking for
7 is the issue of the nondelegable duty of the FELA. I think
8 the jury should be apprised of that since the issue of
9 Kawasaki came up, and --

10 THE COURT: Kawasaki?

11 MR. ROSENTHAL: Yes, being the -- Kawasaki was the
12 one that designed the car.

13 THE COURT: I don't think it came up here that it
14 was someone else's duty.

15 MR. MINO: Yes. In fact, I don't think that was
16 elicited on my --

17 THE COURT: No, there's no evidence of, it was the
18 railroad or Amtrak's duty or something.

19 MR. ROSENTHAL: Yes, I think -- I mean, my reading
20 of Mr. Wallace's testimony --

21 THE COURT: Who's Wallace?

22 MR. ROSENTHAL: He was the person for --

23 THE COURT: One of the earlier ones?

24 MR. ROSENTHAL: Yes.

25 THE COURT: Okay.

1 MR. ROSENTHAL: -- was that he was trying to say
2 that some of the issues regarding how the car came and their
3 acceptance wasn't really -- we didn't really -- we weren't
4 involved in that at all, it was Kawasaki, how the cars came
5 to us and what was on there and what wasn't.

6 THE COURT: That would be fine in a product defect
7 case, they agree to say, we didn't make it, somebody else
8 made it.

9 I'll think about this, but there was really no
10 evidence of -- your expert didn't say it was a design
11 defect.

12 MR. ROSENTHAL: No, no, absolutely.

13 THE COURT: So, you know, I get the Kawasaki
14 instruction when you're pointing the finger at someone else
15 on the chain, but here, I don't know if there's -- I'll
16 think about whether I give it, but I don't think there's any
17 harm in giving it because there was no evidence of anyone
18 else that -- no one pointed a finger at anyone else.

19 MR. MINO: I just think the harm is that just
20 lends to confusion because there was no evidence of it. I
21 think that -- and quite frankly, it could cut against or for
22 PATH. I think a jury is going to be confused --

23 THE COURT: I don't see any confusion about it,
24 because it says "responsibility to inspect" -- it says,
25 "This nondelegable duty -- " -- we can just put, it should

1 be a "nondelegable duty is continuing and imposes on a
2 railroad a responsibility to inspect, maintain, and/or
3 repair its property to insure that its equipment, tools,
4 machinery, and/or appliances and/or the surface conditions
5 of its yards, tracks, and roadbeds are reasonably safe."

6 I'll think about it.

7 Your only objection is it's confusing because
8 there was no evidence of a nondelegable duty.

9 MR. MINO: Yes, there was no evidence presented
10 from any witness, much less a PATH witness, that PATH isn't
11 responsible for these train yards. In fact, Mr. Wallace and
12 Mr. Velez all said they inspected them.

13 MR. ROSENTHAL: The law is it's a nondelegable --

14 THE COURT: I hear you. Let me think about it. I
15 wanted to hear what the scope of the objections are.

16 So you have 11, 17. What else would you like in,
17 Mr. Rosenthal?

18 MR. ROSENTHAL: Twenty-three and 24 are very
19 similar. They involve the issue of PATH's failure to
20 enforce its rules.

21 THE COURT: Any objection?

22 MR. MINO: I'm sorry, I'm just reading it to make
23 sure I understand it.

24 Yes, I mean, PATH would object. At a minimum, I'm
25 not sure that these cases stand for what it says.

1 THE COURT: Well, the jury doesn't get the cite.

2 The jury just gets the proposition.

3 MR. MINO: No, I understand that they don't get
4 the cite, but these are cited to in support of that, and I'm
5 not sure that's what they say.

6 And I guess enforcing the rules is that -- what
7 was the evidence that PATH didn't enforce the rules?

8 MR. ROSENTHAL: Well, there's a lot of evidence
9 that they didn't, that there's this rule on how to get on
10 the car and nobody seems to be --

11 THE COURT: There was a factual dispute about what
12 the training involved. It was clearly a factual dispute.
13 There was a lot of -- there were two or three PATH witnesses
14 who said this is how they were instructed, and it's very
15 serious, and we instruct them, and you have to put your
16 whole foot on the diamond.

17 And Plaintiff said, I got instructed but it was
18 never that specific.

19 That's it, and that's really the defense in this
20 case: He was properly instructed, and he didn't try to get
21 on the car the proper way.

22 So I would imagine that that's -- I'll take a look
23 at the case, but, you know, this one seems relevant for the
24 safe operation of its equipment, tools, machinery, and
25 appliances.

1 We may have to strike that. The safe operation of
2 its rail cars would probably be better.

3 And you have to instruct on it. I mean, that -- I
4 can't imagine that's not the law. You have to have
5 regulations for the safe operation, and you have to instruct
6 them on the rules, procedures, and regulations.

7 But if the objection is Defendant isn't sure what
8 the law is, we'll take a look at the law, and if you have
9 other law overnight that you want to say that's not the law,
10 you can bring it to me in the morning.

11 MR. MINO: Sure.

12 THE COURT: But it looks to me like -- it sounds
13 sound. It doesn't sound unreasonable. And I'll take a look
14 at the cases. Okay?

15 What's next?

16 MR. ROSENTHAL: Number 38 is next. And this is
17 only in response to PATH's repeated claims that they
18 satisfied their safety obligations simply by satisfying the
19 C.F.R.s.

20 THE COURT: Right, because the standard isn't
21 whether they complied with the C.F.R.s. the standard is
22 whether they were reasonably safe.

23 MR. ROSENTHAL: Right.

24 THE COURT: So this looks like it would be
25 appropriate, given the evidence in the case.

1 Any objection?

2 MR. MINO: No.

3 THE COURT: Okay.

4 MR. MINO: Much as I would like to.

5 (Laughter)

6 THE COURT: I know. Unfortunately, it's the law.

7 MR. ROSENTHAL: The next two are 49 and 51, and
8 they are both not -- they are both --

9 THE COURT: Forty-nine and 51.

10 MR. ROSENTHAL: Yes, about the issue of assumption
11 of the risk.

12 THE COURT: Let's talk about 49 first.

13 I understand the second part of it which says --
14 I'll read it for the record: "Contributory negligence may
15 arise only from plaintiff's own acts or acts of negligence,
16 not from knowingly taking on a risk inherent in the work
17 environment or a risk created by defendant's negligence."

18 I understand not from a risk created by
19 Defendant's negligence, not from taking on a risk created.

20 I'm not sure what "a risk inherent in the work
21 environment" means.

22 MR. ROSENTHAL: Well, assumption of the risk is
23 from any risk that the job requires that he undertake in the
24 performance of his duties. It doesn't have to be
25 negligence. It's -- if he's doing his -- just because he's

1 doing his job and there is assumption of the risk, he's not
2 liable for assumption of the risk if the job happens to be
3 dangerous or if it happens to be --

4 THE COURT: But here's the really narrow issue.
5 He works in the railroad. There's risks, and if he acts
6 unreasonably in doing his job, then he's contributorily
7 negligent. And so I don't want to use language that
8 suggests that -- if he does -- if he takes on a risk that's
9 inherent in his job, you know, that can never be the basis
10 for negligence, because the issue is whether he was
11 reasonable in how he took on that risk.

12 In other words, there's going to be -- I assume
13 that the testimony's going to be he didn't have gloves on,
14 his hands were sweaty, and he grabbed the pole and he
15 slipped off it. Okay? Is that an inherent risk in the work
16 environment, so that can't contribute to contributory
17 negligence? Because I think Defendant is going to argue he
18 was negligent in not having his gloves on, and if he had his
19 gloves on he wouldn't have had -- it wouldn't have happened.

20 MR. ROSENTHAL: And I understand their argument.
21 I'm not suggesting that they can't make it. I'm just always
22 worried in a situation like this where there's -- the
23 interplay between assumption of the risk and contributory
24 negligence is so important, but --

25 THE COURT: Let me ask you this question. Let me

1 stop and ask the Defendant if they have any objection to 49.

2 MR. MINO: Yes. PATH would object to 49, and I
3 think that you were right to highlight the problematic
4 phrase in that. PATH actually would like a little bit more
5 of an expansive contributory negligence instruction, but the
6 "not from knowingly taking on a risk inherent in the work
7 environment," just --

8 THE COURT: I don't what that means.

9 MR. MINO: Yes, it's not clear what it means, and
10 I think that it would --

11 (Off the record discussion)

12 THE COURT: Give me one second to look at
13 something.

14 Okay. Let me just read you something from the
15 model instruction on the assumption of the risk. These are
16 the pattern instructions what the 7th Circuit, and they're
17 not addressed by any other circuit.

18 this is on assumption of the risk. This is what
19 the instructions say, quote:

20 "Although there is some overlap between assumption
21 of risk and contributory negligence, the two are not
22 interchangeable. An assumption of risk is an employee's
23 voluntary knowledge and acceptance of a dangerous condition
24 that is necessary for him to perform his duty. Contributory
25 negligence is a careless act or omission on the plaintiff's

1 part tending to add new danger to a condition that the
2 employer negligently created or permitted to exist. The
3 committee recommends against giving the assumption of a risk
4 instruction unless it is necessary to create a
5 misimpression. If the Court chooses to instruct on this
6 topic in a case in which the issue has been injected, the
7 committee recommends the addition of the following sentence,
8 quote: 'It is not a defense that an employee may have
9 assumed the risk of his employment.'"

10 That's the law.

11 So there is an issue here of assumption of the
12 risk. I mean, this is the issue: Did he assume the risk by
13 -- was he required to do this dangerous work, or climb up
14 the way he was forced to climb it? Or did he act carelessly
15 by not climbing on it right and not having a glove on?

16 That's the case as I see it. Right?

17 They're saying he had to do it this way, and they
18 didn't instruct him, and he had to get on the train, so he
19 just did it, and he wasn't told how to do it any way
20 differently, and that's how the injury occurred. They
21 didn't have the rubber, the handrail wasn't in the right
22 place, and he had to get on and off the train, and he didn't
23 get instructed, and he had to get on and off the train in
24 order to perform his duties, and that whole situation was
25 dangerous.

1 Defendants say, on the other hand, it is just what
2 negligence is, that he acted carelessly in not listening to
3 -- not properly getting on and off the train by not wearing
4 his gloves, and that is a careless act tending to create new
5 dangers that -- a condition that the employer negligently
6 created or permitted to exist.

7 So I'd be inclined to give that instruction, with
8 the caveat that it is not a defense that an employee may
9 have assumed the risk of his employment.

10 MR. ROSENTHAL: I have no objection.

11 MR. MINO: I have no objection to that either.

12 THE COURT: Okay. So we'll change it to that
13 language.

14 I'm making the prediction. I wanted to be careful
15 because I think if there's any area where they're going to
16 come back with a question, it's going to be this topic. The
17 ones I worry about the most are the ones I get a question
18 on.

19 So I want to use the model language and think it
20 through, and before you leave, I want to give you a copy of
21 this so you can both read it and read the case, because I
22 think it 's an important point. Okay?

23 MR. ROSENTHAL: Okay.

24 THE COURT: That's 49. I'm going to produce the
25 model.

1 And what about 51?

2 MR. ROSENTHAL: Fifty-one is covered by the same
3 thing. It's another assumption of the risk charge.

4 THE COURT: Okay. So we'll use that one instead.
5 What's next?

6 MR. ROSENTHAL: The last one would be number 76.

7 THE COURT: Okay. Let me read it.

8 I didn't know that there was -- any objection to
9 that?

10 I didn't know there was an issue with him before.

11 MR. ROSENTHAL: It will be.

12 MR. MINO: Yes, it will be with my doctor that
13 some of it was pre-existing.

14 THE COURT: Okay. I didn't think anyone had
15 anything pre-existing when they're only 25. That makes me
16 feel old. Everything I have is -- I guess I have no lawsuit
17 that I'm old.

18 THE PLAINTIFF: Thank you.

19 (Laughter)

20 THE COURT: So far, there's really been no
21 testimony about pre-existing.

22 MR. MINO: Right.

23 THE COURT: If you put this in, I have to give the
24 charge.

25 MR. MINO: No, no, I understand.

1 THE COURT: Okay. And what do you have?

2 MR. MINO: Sure.

3 So I have -- if we go to mine --

4 THE COURT: I'm there.

5 MR. MINO: All right. PATH would ask that its
6 instruction number four on foreseeability be the
7 foreseeability one that was used.

8 THE COURT: Okay. We talked about that earlier,
9 right?

10 MR. MINO: Right.

11 Then we have instruction number nine, and that's
12 regarding PATH not being required to furnish the best or
13 most perfect equipment, just ones that are reasonably safe.

14 THE COURT: And the objection?

15 I would take out, I'd strike the second sentence
16 says -- I'll read it for the record: "The Defendant was not
17 required to furnish Plaintiff with the latest, best, or most
18 perfect appliances with which to work..." I'll leave
19 that. But then I would strike, "nor to discard standard
20 appliances already in use upon discovery of later
21 improvements...", because I don't think there's been any
22 evidence of that.

23 MR. ROSENTHAL: I would object to this charge. I
24 think even the last sentence isn't a proper recitation of
25 the law, "If you find that Defendant had no reason to

1 believe that the means in question was not reasonably
2 safe..." It's not about whether they believe it or not;
3 it's whether -- it is reasonably safe. That's the issue.
4 It's not -- they're not being judged --

5 THE COURT: So it should be if you find that the
6 Defendant -- that the conditions were reasonably safe.

7 MR. MINO: Yes.

8 THE COURT: If you find that the conditions were
9 reasonably safe -- if I allow that one, I'll modify it. If
10 you find that the conditions were reasonably safe, you must
11 find in favor of Defendant, or if you find that Plaintiff's
12 working conditions were reasonably safe. Right?

13 MR. ROSENTHAL: That would -- that would address
14 that last sentence, yes.

15 THE COURT: I'll see if it's redundant, if it's
16 already in there, because I'm not going to say it twice.

17 MR. ROSENTHAL: I do object to the charge in
18 general, but that's --

19 THE COURT: That will clean it up a little bit.

20 All right. Next?

21 MR. MINO: And then instruction number 11, the
22 employee contributory negligence. I think they should be
23 added in. The instruction provided touched on contributory
24 negligence slightly, but I think that this particular 11
25 should actually be put in after the explanation of what

1 negligence is, because they are claiming negligence. PATH
2 is saying, well, he was contributorily negligent. And I
3 think there needs to be a more full explanation of what that
4 means.

5 THE COURT: Okay. I'll take a look at it.
6 Is there any objection to it?

7 MR. ROSENTHAL: I think you cover in your
8 negligence area -- I mean, contributory negligence is
9 negligence. I mean, it's just negligence of the Plaintiff
10 versus the --

11 THE COURT: I'll take a look at it. There's
12 nothing -- if it's not clear, I'll add it, because there are
13 two forces here: There's negligence on the part of the
14 Defendant, and there's negligence on the part of the
15 Plaintiff.

16 MR. ROSENTHAL: Right. I think I've seen in some
17 of the model charges they use the same language for both,
18 and in that way, you're protecting yourself.

19 THE COURT: Okay. I'm going to take a look at it,
20 and I'll let you know tomorrow. All right?

21 MR. MINO: All right. And that was all that PATH
22 would add.

23 THE COURT: Okay. Do we have enough copies of
24 this? I'm going to mark this one that I marked, I'll mark
25 it as Court Exhibit 6, okay, so we have Court Exhibits, so

1 we have a list of what your objections were and there's a
2 record of them. Okay? And we'll get back to you on that
3 tomorrow.

4 (Court Exhibit 6 marked for identification)

5 THE COURT: Let's talk about the verdict sheet.

6 MR. ROSENTHAL: I believe that you have -- under
7 the FELA, for both Plaintiff and Defendant, it has to be
8 "caused or contributed, in whole or in part," which is the
9 statutory language. I would ask for even more stringent
10 language of --

11 THE COURT: Let's talk about a question and tell
12 me what you're asking.

13 MR. ROSENTHAL: I'm looking at question number one
14 and question number three.

15 THE COURT: Okay.

16 MR. MINO: Mr. Rosenthal is correct. FELA
17 45 U.S.C. -- and I'm blanking on the rest, does say, in
18 whole or in part. I agree that it should match what the
19 statute is.

20 THE COURT: So what do you propose?

21 MR. ROSENTHAL: Maybe the easiest way to do it
22 would be, Do you find that Defendant PATH was negligent and
23 Defendant PATH's negligence caused and contributed, comma,
24 in whole or in part, comma, to Steven Foder's injury.

25 And in number three, Do you find that the

1 Plaintiff was also negligent and Plaintiff's negligence
2 caused or contributed, comma, in whole or in part, to his
3 own injuries?

4 THE COURT: That works for me. Okay?

5 Anything else?

6 MR. ROSENTHAL: That's my only objection to the
7 verdict sheet.

8 MR. MINO: Yes, with respect to the verdict sheet,
9 I would prefer to order it, was PATH negligent, was
10 Plaintiff negligent, then award damages, so sort of flip two
11 and three.

12 THE COURT: I agree. Negligence should come
13 first.

14 MR. MINO: Right. And then damages.

15 THE COURT: And then three.

16 MR. MINO: And quite frankly, I would prefer to
17 break up, was PATH negligent, question two, did that
18 negligence cause or contribute, in whole or in part, and
19 then do the same thing with the Plaintiff's negligence. So
20 essentially there's six questions.

21 THE COURT: Say that again.

22 MR. MINO: So question number one would be, Do you
23 find that Defendant PATH was negligent? Yes or no.
24 Question two would be, did Defendant PATH's negligence cause
25 or contribute in whole or in part --

1 THE COURT: Let me just stop you for a minute.

2 The way I have it, then, is done for a reason. If
3 they say that PATH was not negligent, if the answer to
4 question one is no, PATH was not negligent, the case is
5 over; right?

6 MR. MINO: Yes.

7 THE COURT: Okay. So if you answer no, do not
8 answer questions.

9 Question two. If they say yes, Do you find that
10 Plaintiff was also negligent and that Plaintiff's negligence
11 caused or contributed, in whole or in part, to his own
12 injuries, then they would say yes.

13 Then question three would become --

14 MR. MINO: I guess what I'm saying is, there's a
15 scenario at least why they could find, either PATH or
16 Plaintiff, was negligent, did something wrong, didn't pay
17 enough attention, was careless, but also that that
18 carelessness didn't cause or contribute to the injury, which
19 is why I would break up the two sections.

20 THE COURT: The reason why I didn't do it is
21 because this was taken from a model from one of the
22 circuits, the 7th Circuit model, because I discussed this
23 with Alex about whether we should break up negligence and
24 causation. It's broken up in the instructions, and if you
25 can find me a model where they break it up, I'll be happy to

1 consider it tomorrow. But the model that I found put it all
2 in one question.

3 MR. MINO: Sure.

4 THE COURT: That's the only reason why I did it.
5 I had the same issue.

6 And then I'm not sure we should have that first
7 phrase. Three would then come without taking into
8 consideration any possible negligence by Plaintiff.

9 MR. ROSENTHAL: No.

10 THE COURT: I think that's confusing.

11 MR. ROSENTHAL: The other issue that I actually,
12 looking at it, ask for is that we break up the -- the lost
13 overtime is clear, but the pain and suffering, his past pain
14 and suffering versus his future pain and suffering, I just
15 want to make sure that --

16 THE COURT: Let's make sure that's in -- we're not
17 going to break it up into past and future because I don't
18 think there was a clear demarcation line. In other words,
19 the future is everything after today, right? So we can say
20 in the charge, and I've got to look back in the charge, do
21 we say in evaluating pain and suffering you should take into
22 consideration everything he has suffered to date as well as
23 what you think he will be reasonably expected to suffer in
24 the future.

25 MR. ROSENTHAL: If that's dealt with --

1 THE COURT: If that's in there. You have to tell
2 me.

3 MR. MINO: It is not.

4 THE COURT: Okay.

5 MR. MINO: Or at least it's not under the damage
6 section.

7 "The damage a party suffers means the amount of
8 money that will fairly compensate him for any injuries
9 sustained and is reasonably certain to sustain in the
10 future."

11 MR. ROSENTHAL: It's in brackets, right. Are you
12 talking about pain and suffering?

13 THE COURT: What page are you on?

14 MR. ROSENTHAL: Twelve? Is that where you are?

15 THE COURT: On the Court's instructions?

16 MR. MINO: Yes. So if you look right under the
17 third point, damage, the second sentence talks about the
18 parties suffering --

19 THE COURT: And is reasonably expected to
20 experience in the future.

21 MR. MINO: Right.

22 MR. ROSENTHAL: Okay.

23 THE COURT: So it's in there.

24 So let's go back to the verdict sheet. So I'll
25 have one and two.

1 Maybe it makes sense to have three, the
2 apportionment, before we get to damages?

3 MR. MINO: Yes.

4 MR. ROSENTHAL: Okay.

5 THE COURT: What percentage of Plaintiff's -- but
6 then I don't know because then we talk about damages caused
7 by the negligence of the expected parties. If they find
8 that both were negligent, then they have to give the damages
9 -- we may have to apportion it first and then have them go
10 to damages.

11 MR. ROSENTHAL: Oh, I think apportioning it first.

12 MR. MINO: Yes, I think we can reword the
13 phrasing.

14 THE COURT: I'll move the apportionment to three,
15 and then the damage question. Okay?

16 You know what I think we should do tomorrow? I'm
17 thinking about it. We're going to be here on Friday. We're
18 not going to get a verdict tomorrow. We have two witnesses.
19 We have to go over these again. We have summations, and we
20 have to have the jury deliberate. So maybe to give you guys
21 a little bit of time -- I know Mr. Rosenthal and company are
22 traveling -- why don't we just tomorrow do the two witnesses
23 and break, and send the jury home early?

24 MR. MINO: Okay.

25 THE COURT: And then we can have the charge

1 conference after the jury leaves and get them in shape, you
2 guys leave a little bit earlier tomorrow, and then Friday
3 morning, I'll charge, we'll have closing statements, and
4 give it to the jury.

5 MR. MINO: Okay.

6 MR. ROSENTHAL: No objection.

7 THE COURT: Does that make sense?

8 MR. MINO: Just with respect to Dr. Whitley, what
9 PATH is willing to do is stipulate that her notes will come
10 in, but the PATH Medical file includes stuff that she
11 doesn't -- that's not hers.

12 MR. ROSENTHAL: What's the exhibit?

13 MR. DiGIULIO: I know what he means. The 360
14 report and stuff was in there.

15 MR. MINO: The 360 report, but also medical
16 records.

17 MR. ROSENTHAL: He's talking about other medical
18 records. Yes, I have no objection to that.

19 THE COURT: So you have a stipulation.

20 MR. MINO: So, yes, so what PATH will stipulate to
21 is the introduction into evidence of all of Dr. Whitley's
22 notes.

23 MR. ROSENTHAL: Relating to this incident.

24 MR. MINO: Relating to this incident, perfect,
25 from the PATH Medical file.

1 THE COURT: From the PATH Medical file.

2 MR. MINO: Yes.

3 THE COURT: So all I need you to do tomorrow is
4 move them into evidence.

5 MR. MINO: Yes.

6 THE COURT: If there's no objection, you just move
7 them into evidence. You don't need a stipulation. I mean,
8 you say, there's no objection to moving them into evidence.

9 MR. MINO: Okay. That's fine.

10 THE COURT: And then the jury gets them.

11 MR. MINO: Right.

12 THE COURT: So I just need to know exactly what
13 documents. Are they all in one exhibit?

14 MR. MINO: No, they're not.

15 MR. ROSENTHAL: He's going to have to fold hem.

16 MR. MINO: I'll fold them and bring them all
17 tomorrow, copies for everyone.

18 THE COURT: We'll make it a new exhibit.

19 MR. MINO: Yes.

20 THE COURT: And that will be what goes in to the
21 jury. Okay?

22 So here's the plan. You do that tomorrow. We'll
23 come at 9:30. I would have done 10 if I had known we were
24 going to have a shorter day. But we'll do both witnesses,
25 we'll have a final charge conference, send you home early,

1 and then we'll charge, close, and give it to the jury on
2 Friday.

3 MR. MINO: Perfect.

4 THE COURT: Okay?

5 MR. DiGIULIO: Your Honor, as a matter of
6 housekeeping, we have the --

7 THE COURT: Yes, I'll save that forever.

8 (Laughter)

9 MR. DiGIULIO: The science project.

10 THE COURT: When I retire someday, I'll save it
11 for my retirement party.

12 MR. DiGIULIO: I didn't know whether you wanted to
13 mark it in evidence.

14 THE COURT: We will. I'll give it to Amy
15 tomorrow.

16 Have a safe night. We'll see you tomorrow at
17 9:30.

18 Thank you.

19 MR. MINO: Thank you, Your Honor.

20 MR. ROSENTHAL: Thank you, Your Honor.

21 (Matter adjourned until Thursday, November 17, 2016,
22 commencing at 9:30 a.m.)

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